~~1272~~ No. 3538 1273

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3538

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index. Page

Index.

Names and Addresses of Attorneys of Record.

DANSON, WILLIAMS & DANSON, Paulsen Building, Spokane, Washington,

DON M. KIZER, Hyde Building, Spokane, Washington,

POST, RUSSELL & HIGGINS, Spokane, Washington,

Attorneys for Defendant and Plaintiff in Error.

GRAVES, KIZER & GRAVES, Old National Bank Building, Spokane, Washington,

LEE & KIMBALL, Hyde Building, Spokane, Washington,

W. E. CULLEN, Hyde Building, Spokane, Washington,

Attorneys for Plaintiff and Defendant in Error. [2*]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

---

*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Plaintiff, for his cause of action against the defendant herein, alleges:

I.

That plaintiff is a resident and citizen of Butte, in the State of Montana, and that the defendant is a resident and citizen of Spokane, in the State of Washington.

II.

That the amount involved in this controversy, the subject matter of this action, exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

III.

That for some time prior to the 8th day of May, 1917, and on said day, plaintiff and defendant were stockholders in that certain corporation known as "E. H. Stanton Co.," organized and existing under the laws of the State of Washington, with its principal place of business at Spokane, Washington, with a total capital stock of Six Thousand (6,000) shares. That said corporation was during all of said times engaged in the general business of buying livestock and other meat products, [3] butchering, packing, preserving and selling the same at its plant located at Spokane, Washington. That the plaintiff was induced by the defendant to invest in the stock of said corporation to the extent of 1096⅓ shares, which said stock plaintiff owned on said 8th day of May, 1917. That prior to said date plaintiff had, at the special instance and request of the defendant, as-

sisted defendant in financing said corporation and that the relations then and at all times prior to said 8th day of May, 1917, had become and were very close and confidential and that plaintiff had assisted defendant to his benefit in a financial way in placing said corporation in good financial condition. That the defendant was during all of said times the President of said corporation, and the General Manager thereof.

IV.

That prior to the month of May, 1917, the defendant requested the plaintiff to hold his said stock, consisting of 1096⅓ shares and to refrain from placing the same upon the market or selling the same until such time as the defendant should sell his stock in said corporation, and in consideration of plaintiff's so withholding his stock from the market the defendant represented and promised to the plaintiff that he would advise plaintiff of any opportunity to sell plaintiff's and defendant's stock together, and that he, the defendant, would, without other consideration than the benefit accruing to him, the defendant, therefrom, act as the agent of plaintiff in placing plaintiff's said stock with any purchaser to whom the defendant might desire to sell his stock, and would secure for plaintiff the best price possible and the same price at which he, the defendant, should sell if he concluded to sell his said stock. That in consideration of said representations and promises plaintiff agreed to and did hold his said stock and did depend upon the defendant to place said stock at such price as the defendant should secure for his own stock [4] in the event of an opportunity to sell.

V.

That during the month of May, 1917, without the knowledge or consent of this plaintiff, the defendant contracted to sell his, the defendant's stock, and all the plaintiff's stock to Armour & Co., a corporation, and that the price stipulated in said Contract of Sale for said stock was Two Hundred Twenty Dollars ($220.00) per share. That after the making of said contract between defendant and said Armour & Co. defendant represented to plaintiff that he had an opportunity to sell plaintiff's stock and his, the defendant's stock to Armour & Co., but falsely and fraudulently represented to plaintiff that the price defendant was to receive therefor was Two Hundred Dollars ($200.00) per share. That defendant contracted to sell to said Armour & Co., 5,084⅓ shares of the capital stock of said E. H. Stanton Co., to Armour & Co., at said time, at said price of Two Hundred Twenty Dollars ($220.00) per share, and that said amount or number of shares included plaintiff's said stock.

VI.

That without revealing to plaintiff the terms of said Contract with Armour & Co., or the fact that any such Contract had been entered into, and by falsely and fraudulently stating to plaintiff that the price at which defendant's stock was to be sold and at which plaintiff's stock was to be sold was the sum of Two Hundred Dollars ($200.00) per share, defendant induced plaintiff to sell his said stock to Armour & Co., as he supposed, for the sum of Two Hundred Dollars ($200.00) per share, when in truth and in fact said

sale was made by defendant to said Armour & Co. at Two Hundred Twenty Dollars ($220.00) per share, and that defendant took and received as the proceeds of said sale of plaintiff's said stock the sum of Twenty Dollars ($20.00) per share in excess of the amount paid to plaintiff or accounted [5] for to him by the said defendant. That the plaintiff delivered his said stock to said Armour & Co. or to the defendant for said Armour & Co., and received therefor payment at the rate of Two Hundred Dollars ($200.00) per share, and no more.

VII.

That the plaintiff at all times relied upon the defendant and upon his Contract with the defendant to place and sell plaintiff's stock at the same price which defendant received for his, and that by reason of the false and fraudulent statements and representations of the defendant to plaintiff the plaintiff was defrauded out of the sum of Twenty Dollars ($20.00) per share, which said sum defendant received and retained unlawfully and fraudulently, to plaintiff's damage in the sum of Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67). That plaintiff did not know the true facts concerning said transaction until after said Contract between defendant and said Armour & Co. had been executed and did not learn the true facts concerning the same until long thereafter. Upon discovery of said facts and of the fraud so perpetrated upon him plaintiff demanded of the defendant that defendant pay over to plaintiff the balance of said purchase price, to wit, the sum of

Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67), which said demand was by the defendant refused.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Twenty-one Thousand Nine Hundred Twenty-six and 67/100 Dollars ($21,926.67), with interest thereon from and since the 21st day of May, 1917, together with the costs and disbursements of this action.

LEE & KIMBALL,
W. E. CULLEN,

Attorneys for Plaintiff, 505 Hyde Block, Spokane, Wash. [6]

State of Washington,
County of Spokane,—ss.

W. E. Cullen, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the foregoing-entitled action, and makes this verification for and on behalf of said plaintiff J. L. Hamilton, for the reason that said plaintiff is not now within the said State of Washington; that he has read the foregoing complaint, knows the contents thereof, and that the same is true as he verily believes.

W. E. CULLEN.

Subscribed and sworn to before me this 12th day of July, A. D. 1919.

P. W. KIMBALL,
Notary Public, in and for the State of Washington, Residing at Spokane, Washington.

Filed in the U. S. District Court, Eastern District of Washington, July 14, 1919. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [7]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Amended Answer.

Comes now the defendant and for an amended answer to the complaint of the plaintiff herein states and alleges:

I.

Admits paragraphs 1 and 2 of said complaint.

II.

Answering paragraph 3 of said complaint, defendant admits that for a long time prior to the 8th day of May, 1917, plaintiff and defendant were stockholders in E. H. Stanton Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Spokane therein, with a capital stock of six thousand shares. Further admits that said corporation was engaged in the general business of buying livestock and other meat products, butchering, packing, preserving and selling the same at its plant located at Spokane, Washington, and that the defendant was the president and general manager of said corporation. Denies that plaintiff owned any other or greater number of shares of the capital stock of the

E. H. Stanton Company than one thousand ninety-six and one-third shares. Denies each and every other allegation, matter and thing contained in said paragraph.

III.

Denies each and every allegation, matter and thing contained in paragraph four of said complaint.

IV.

Answering paragraph 5 of said complaint, defendant denies each and every allegation, matter and thing contained in said paragraph, and by way of explanation, states the fact to be [8] that in the early part of May, 1917, the defendant gave an option on 5,084⅓ shares of the capital stock of the E. H. Stanton Company to a real estate dealer at the price of two hundred twenty ($220.00) dollars per share, and that said real estate dealer attempted to interest Armour & Company, a corporation, in the purchase of said stock at the price and according to the conditions of said option, but said Armour & Company, a corporation, would not purchase said stock at such a price or under the terms of the option agreement.

V.

Answering paragraph 6 of said complaint defendant denies each and every allegation, matter and thing contained in said paragraph, save and except defendant admits that plaintiff sold his stock to Armour & Company for two hundred ($200.00) dollars per share, and further states the fact to be that plaintiff negotiated the sale of his stock to Armour & Company personally and without any representations being made to him by defendant.

VI.

Denies each and every allegation, matter and thing contained in paragraph 7 of said complaint.

For further answer and by way of an affirmative defense herein, defendant states and alleges:

I.

That on or about May 21st, 1917, plaintiff entered into an agreement in writing with Armour & Company, a corporation to sell it all the stock he owned in the E. H. Stanton Company for the sum of $219,366.66, to wit: 1096⅓ shares at $200.00 per share, plaintiff to deposit his stock in the bank of W. A. Clark & Brothers in Butte, Montana, on or before May 25th, 1917, and Armour & Company to deposit the purchase price on or before the same day, said purchase price being part in cash and part in notes of Armour & Company bearing 5% interest and payable respectively, one, two, three and four years after date. That prior to depositing the said stock in said bank plaintiff learned [9] that defendant had made a contract with Armour & Company whereby the defendant would receive from Armour & Company for the stock owned by the defendant and for defendant's guarantee of the accounts of E. H. Stanton Company and for defendant's agreement not to engage in any business carried on by E. H. Stanton & Company in any capacity whatsoever in the four northwestern states for the period of ten years, and for defendant's services to be thereafter rendered to Armour & Company and the E. H. Stanton Company, a sum of money which exceeded by approximately $92,000.00 the sum arrived

at by multiplying by $200.00 the number of shares owned by defendant and his family, to wit 2420⅔ shares, and the plaintiff prior to depositing the said stock in said bank became fully familiar with all the facts in relation thereto, but nevertheless and notwithstanding such knowledge proceeded to and did deposit his said stock in said bank as provided for in his said written agreement.

II.

Subsequent to May 21st, 1917, and before June 1st, 1917, and after acquiring the knowledge referred to in the preceding paragraph, the plaintiff came to Spokane, Washington, and either for himself or for himself and J. E. Hample purchased from one Mabel Overholt 773⅓ shares of the capital stock of the E. H. Stanton Company at the price of $190.00 per share. Armour & Company failed and neglected to deposit in the said banking house of W. A. Clark & Brothers on or before May 25, 1917, as provided in its contract with the plaintiff, the moneys and notes as therein provided, and thereafter and on or about June 2, 1917, the plaintiff went to said banking house and demanded of and received from it the said 1096⅓ shares of stock theretofore deposited by the plaintiff with the said bank, and notified said Armour & Company that he refused to sell said stock to said Armour & Company under said contract, and that the said contract had been obtained by fraud and false representations and through [10] conspiracy between the said Armour & Company and the defendant, whereby the plaintiff was deceived and was to be defrauded, and for those reasons his

said written agreement of May 21st, 1917, was vitiated and of no force and effect, and that he would not carry out the same. Subsequently negotiations were entered into between the plaintiff and Armour & Company whereby the plaintiff sold to Armour & Company the said shares of stock, to wit, those purchased from Mabel Overholt and those originally owned by the plaintiff, amounting in the aggregate to 1869⅔ shares, for the sum of about $391,000.00, or about 16,000.00 in excess of $200.00 per share for all of said stock, and the same was so delivered under said contract and paid for by said Armour & Company.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein and that the defendant recover his costs and disbursements herein expended.

POST, RUSSELL & HIGGINS,
DON F. KIZER,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. H. Stanton being first duly sworn deposes and says: That he is the defendant above named, that he has read the foregoing amended answer, knows the contents thereof, and the same is true, as he verily believes.

E. H. STANTON.

Subscribed and sworn to before me this 5th day of April, 1920.

FRED K. JONES,
Notary Public in and for the State of Washington,
Residing at Spokane.

Filed in the U. S. District Court, Eastern District of Washington. April 7, 1920. W. H. Hare, Clerk.
[11]

In the District Court of the United States, in and for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Second Amended Answer.

Comes now the defendant and for an amended answer to the complaint of the plaintiff herein states and alleges:

I.

Admits paragraphs 1 and 2 of said complaint.

II.

Answering paragraph 3 of said complaint defendant admits that for a long time prior to the 8th day of May, 1917, plaintiff and defendant were stockholders in E. H. Stanton Company, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Spokane therein, with a capital stock of six thousand shares. Further admits that said corporation was engaged in the general business of buying livestock and other meat products, butchering, packing, preserving and selling the same at its plant located at Spokane, Washington, and that the defendant was

the president and general manager of said corporation. Denies that plaintiff owned any other or greater number of shares of the capital stock of the E. H. Stanton Company than one thousand ninety-six and one-third shares. Denies each and every other allegation, matter and thing contained in said paragraph.

III.

Denies each and every allegation, matter and thing contained in paragraph four of said complaint.

IV.

Answering paragraph five of said complaint, defendant denies each and every allegation, matter and thing contained in said paragraph, and by way of explanation, states the fact to be that in [12] the early part of May, 1917, the defendant gave an option on 5,084⅓ shares of the capital stock of the E. H. Stanton Company to a real estate dealer at the price of two hundred twenty ($220.00) dollars per share, and that said real estate dealer attempted to interest Armour & Company, a corporation, in the purchase of said stock at the price and according to the conditions of said option, but said Armour & Company, a corporation, would not purchase said stock at such a price or under the terms of the option agreement.

V.

Answering paragraph 6 of said complaint defendant denies each and every allegation, matter and thing contained in said paragraph, save and except defendant admits that plaintiff sold his stock to Armour & Company for two hundred ($200.00) dollars per

share, and further states the fact to be that plaintiff negotiated the sale of his stock to Armour & Company personally and without any representations being made to him by defendant.

VI.

Denies each and every allegation, matter and thing contained in paragraph seven of said complaint.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein and that the defendant recover his costs and disbursements herein expended.

POST, RUSSELL & HIGGINS,
DON F. KIZER,
Attorneys for Defendant.

State of Washington,
County of Spokane,—ss.

E. H. Stanton, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the foregoing amended answer, knows the contents thereof, and the same is true as he verily believes.

E. H. STANTON.

Subscribed and sworn to before me this 13th day of April, 1920.

W. H. MILLER,
Notary Public in and for the State of Washington,
Residing at Spokane. [13]

Filed in the U. S. District Court, Eastern District of Washington. April 13, 1920. W. H. Hare, Clerk. [14]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff in the sum of Twenty-five Thousand One Hundred and Nine and 06.100 ($25,109.06) Dollars.

W. C. WEBSTER,
Foreman.

Filed in the U. S. District Court, Eastern District of Washington. April 15, 1920. W. H. Hare, Clerk. [15]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Judgment.

This case came on regularly for hearing on this 12th day of April, 1920, before the Court sitting with a jury. Plaintiff appears in person and by his attorneys Messrs. Lee & Kimball and Frank H. Graves, Esq. Defendant appears in person and by his attorneys Don F. Kizer, Esq., and Frank T. Post, Esq. Both parties announced they were ready for trial. The jury was regularly impanelled and sworn to try the case. Testimony was introduced on behalf of both plaintiff and defendant, argument made by counsel and the case submitted to the jury under instructions of the Court. The jury retired and returned with the following verdict:

"We, the jury in the above-entitled cause, find for the plaintiff in the sum of Twenty-five Thousand One Hundred and Nine and 06/100 ($25,109.06) Dollars.

W. C. WEBSTER,
Foreman."

The verdict was ordered filed by the Court.

NOW, THEREFORE, from the foregoing and upon the verdict of the jury, it is hereby ORDERED, ADJUDGED AND DECREED, that plaintiff do have and recover from the defendant the sum of Twenty-five Thousand One Hundred and Nine and 06/100 ($25,109.06) Dollars, together with costs herein, to be taxed by the clerk, with interest thereon at the rate of six (6) per cent per annum from the date hereof, and that execution issue thereon.

FRANK H. RUDKIN,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 20, 1920. W. H. Hare, Clerk. [16]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

No. 3261.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Extending Time for Filing Bill of Exceptions.

Upon motion of the defendant, and upon stipulation of counsel in open court, IT IS ORDERED that the time for service and filing by the defendant of a proposed bill of exceptions herein is hereby extended for the period of sixty (60) days from this date.

Done in open court this 20th day of April, 1920.

FRANK H. RUDKIN,

Judge.

Filed in the U. S. District Court, Eastern District of Washington. April 20, 1920. W. H. Hare, Clerk. [17]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Petition for Writ of Error.

Comes now E. H. Stanton, defendant herein, and says: That on or about the 20th day of April, 1920, this Court entered a judgment herein in favor of plaintiff, J. L. Hamilton, and against said defendant, E. H. Stanton, in the sum of Twenty-five Thousand One Hundred Nine and 6/100 ($25,109.06) Dollars, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of defendant, all of which will appear more in detail from the assignment of errors which is filed with this petition.

WHEREFORE, the said E. H. Stanton prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals in and for the Ninth Circuit of the United States, for the correction of the errors so complained of and that the Court fix the bond to operate also as a supersedeas and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

DANSON, WILLIAMS & DANSON,
Attorneys for Defendant.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [18]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Assignments of Error.

Comes now the defendant, E. H. Stanton, and makes the following assignments of error, which defendant avers occurred upon the trial of this cause and which defendant will rely upon in the prosecution of the writ of error in the above-entitled cause.

1. The Court erred in overruling defendant's objections and permitting the witness Huntley to testify as to the amount received by him in the sale of his stock to Armour & Co.

2. The Court erred in instructing the jury as follows:

> "I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony."

3. The Court erred in instructing the jury as follows:

"If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co.; that the plaintiff had no knowledge concerning the price which Armour & Co. was willing to pay or the price which defendant was to get for his stock except such as the defendant gave him; that by reason of the misstatement of concealment of any material fact or facts by the defendant, plaintiff was induced to accept $200 a share for his stock whereupon $20 on the number of shares owned by him was added to the price paid to defendant for his stock without plaintiff's knowledge or consent, and that this $20 per share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 per share, then I charge you that the amount of money thus received, to wit: $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest [19] thereon from the time of its receipt by the defendant at the rate of 5% per annum."

4. The Court erred in instructing the jury as follows:

"On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale

of his stock on his own responsibility without advising or consulting with the defendant and fixed his own selling price, there can be no recovery in this action even though the defendant may have received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event, the plaintiff is still entitled to the right to recover regardless of the question of agency."

5. The Court erred in instructing the jury as follows:

"The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized defendant to sell his stock at the same price that defendant would sell his own stock, and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share and that in reliance thereon plaintiff agreed to sell his stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant, and that the defendant received from Armour & Co. upon the sale of plaintiff's stock the sum of $20 per share,"

6. The Court erred in instructing the jury as follows:

"In order for the plaintiff to recover *on this theory,* he must therefore establish by a preponderance of the evidence the following proposi-

tions: (1) that the plaintiff authorized defendant to sell his stock and the defendant agreed to sell the same at the same price that he received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant."

7. The Court erred in instructing the jury as follows:

"If the plaintiff has failed to establish by a preponderance of the evidence any of these propositions, the plaintiff cannot recover on that theory. If, however, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him." [20]

8. The Court erred in instructing the jury as follows:

"If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant unless,

as already stated, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him."

9. The Court erred in refusing to give defendant's requested Instruction No. 1, as follows:

"The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock.

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock.

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein."

10. The Court erred in refusing to give defendant's requested Instruction No. 4 as follows:

"If you should find from the evidence that before Armour & Company actually paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defendant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the bank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you find in favor of the plaintiff on the other issues as stated above." [21]

11. The Court erred in refusing to give defendant's requested Instruction No. 5 as follows:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company but that Armour & Company failed

to deposit the moneys and notes in the same bank as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud, and thereafter plaintiff entered into another contract with Armour & Company whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor part in money and part in its promissory notes, then you must find for the defendant in this action, even though as to other issues stated above you should find that the evidence is in favor of the plaintiff."

12. The Court erred in instructing the jury as follows:

"If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co., failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co., that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud and there-

after plaintiff entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock in question, together with other stock in the same company and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff. If, however, you find from a preponderance of the testimony that the stock was finally delivered to Armour & Co. pursuant to the contract made and entered into in the City of Spokane, and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery."

13. The Court erred in entering judgment on the verdict in favor of plaintiff.

14. The Court erred in denying defendant's motion for a new trial.

WHEREFORE, the said defendant, the plaintiff in error, [22] prays that the judgment of the said Court be reversed; that such directions be given, that full force and efficacy may inure to the defendant by reason of the assignments of error above and the defenses set out in his answer filed in said cause.

DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error, Defendant in the Lower Court.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [23]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Allowing Writ of Error.

On this 19th day of June, 1920, came the defendant, E. H. Stanton, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed therewith his assignments of error intended to be urged by him, and praying that the bond to be given to operate also as a supersedeas and stay bond be fixed by the Court, and also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and such other and further proceedings may be had as may be proper in the premises.

In consideration thereof the Court does allow the writ of error and the bond for such writ of error and also to operate as a supersedeas is fixed at the sum of Thirty Thousand ($30,000) Dollars, and upon defendant giving such bond all proceedings to enforce such judgment to be stayed until such writ of error is determined.

FRANK H. RUDKIN,
U. S. District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [24]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Writ of Error (Copy).

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment on a plea which, in the said District Court before you, or some of you, between E. H. Stanton, plaintiff in error (defendant in the lower court), and J. L. Hamilton, defendant in error (plaintiff in the lower court), a manifest error hath happened to the great damage of said E. H. Stanton, plaintiff in error, as by his complaint appears:

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done. [25]

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred and twenty.

W. H. HARE,

Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

FRANK H. RUDKIN,
District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [26]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, E. H. Stanton, the defendant above named, as principal, and United States Fidelity & Guaranty Company, a surety corporation organized and existing under the laws of the State of Maryland, and authorized to become sole surety on judicial bonds, as surety, are held and firmly bound unto J. L. Hamilton, the plaintiff above named, in the sum of Thirty Thousand ($30,000) Dollars, to be paid the said J. L. Hamilton, his representatives and assigns, for which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, our representatives, successors and assigns firmly by these presents.

Sealed with our seals and dated this 19th day of June, 1920.

WHEREAS, the above-named E. H. Stanton has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the District Court of the United States for the Eastern District of Washington, Northern Division, and said

District Court has fixed the bond to be given on said writ of error at the sum of Thirty Thousand ($30,000) Dollars, to operate for the purpose of the writ of error and also as a supersedeas and stay.

NOW, THEREFORE, the condition of this obligation is [27] such that if the above-named principal, E. H. Stanton, shall prosecute said writ to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

E. H. STANTON. (Seal)

UNITED STATES FIDELITY & GUARANTY COMPANY,

By O. N. ANDERSON,

Its Attorney in Fact.

Approved June 19, 1920.

FRANK H. RUDKIN,

District Judge.

Filed in the U. S. District Court, Eastern District of Washington. June 19, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [28]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Citation on Writ of Error (Copy).

The President of the United States to J. L. Hamilton, and to Messrs. Lee & Kimball and Graves, Kizer & Graves, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error regularly issued and which is on file in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein E. H. Stanton is plaintiff in error (defendant in the lower court) and J. L. Hamilton is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable, EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 21 day of June, 1920.

FRANK H. RUDKIN,
United States District Judge.

Attest: W. H. HARE,
Clerk of said Court [29]

RETURN ON SERVICE OF WRIT.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I served the an-

nexed citation on the therein named A. B. Lee, by handing to and leaving a true and correct copy thereof with him, personally, at Spokane, in said District, on the 21st day of June, A. D. 1920.

J. E. McGOVERN,
U. S. Marshal,
By J. W. Dennison,
Deputy.

Serving writ—$2.00.
Mileage— .06.

$2.06.

Filed in the U. S. District Court, Eastern District of Washington. June 21, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [30]

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED: That the above-entitled cause came on regularly for trial in the above-entitled court on the 12th day of April, 1920, at 10 o'clock A. M., before the Honorable Frank H. Rudkin, Judge presiding, and a jury impaneled. The plaintiff, J. L. Hamilton, appeared by his attorneys,

(Testimony of A. E. Kane.)

Lee & Kimball, W. E. Cullen and Graves, Kizer & Graves, and the defendant, E. H. Stanton, appeared by his attorneys, Don F. Kizer and Post, Russell & Higgins, whereupon the following proceedings were had and done, to wit: [31]

Testimony of A. E. Kane, for Plaintiff.

A. E. KANE, called and sworn as a witness on behalf of the plaintiff, testified that he was an official court reporter in the Superior Court of Spokane County and that he had reported a case of Fred B. Grinnell vs. E. H. Stanton; that in that case Mr. Stanton testified as follows:

"Mr. KIZER.—Just a moment, if I may; he didn't say 92,000—32,000 odd—

"Mr. GRAVES.—What do you mean by 92,000 odd? I want to get him somewhere where he will say. What were you to get over and above the $200 a share?

"A. I was to get twenty cents a share on all the stock that had been sold at that time.

"The COURT.—$20.00 you mean?

"A. Twenty dollars on all the stock that had been sold at that time, and it amounted to ninety-two thousand some odd dollars and that wasn't enough. Then I told them I would take the automobile in and even then it was not enough and then Mr. O'Hern made the proposition that he would give me $2.20 a share for all the stock I would turn over to him in four months; and I closed the deal on those lines.

"Q. You were to get $20 a share commission on all the stock that had been bought at that time?

"A. Yes, sir.

(Testimony of A. E. Kane.)

"Q. That included first Hample and Hamilton's stock? A. Yes, sir.

"Q. And second, it included yours and your family's stock?

"A. It wasn't a commission.

"Q. We won't call it anything. You were to get $20 a share on it?

"A. That was the way we figured it. [32]

"Q. That meant now, reduced to figures, that you were to get $20 a share on Hample's stock, didn't it?

"A. Not on Hample's stock, no, sir.

"Q. Didn't include that?

"A. No, sir; I had nothing to do with Hample's stock or Hamilton's.

"Q. What stock had been sold at that time that you were to get $20 a share on?

"A. On the stock that was sold—Mr. O'Hern—Mr. Robinson said it never would do to let that $100,000 or whatever it amounted to, get into Chicago that way. And that was the way he put it in. It was easier to let it go on the option that way.

"Q. Let me see if I understand that. The only stock that he bought at that time was your stock and Hample's and Hamilton's, was it? A. Yes, sir.

"Q. Hample had 1096 and a fraction and Hamilton had 1096 and a fraction? A. Yes, sir.

"Q. And you had 2,420 and a fraction?

"A. Yes, sir.

"Q. That is all they bought at that time?

"A. Yes, sir.

"Q. Didn't you just say you were to get $20 a share

(Testimony of A. E. Kane.)

on all the stock they bought at that time?

"A. I explained that transaction to you right *at* we were in that Davenport Hotel, start to finish. [33]

"Q. To me? A. Yes, right there.

"Q. Well, now, I am not asking you—I am a funny fellow about that; I like to get at it piecemeal. You were to get $20 a share on all stock that they had bought up to that time? A. Yes, sir.

"Q. Now they hadn't bought any stock up to that time had they, except you three men's?

"A. Yes; that is all.

"Q. Now, were you to get $20 a share on these three lots? A. It figured up that way.

"Q. Never mind how it figured up; I asked you were you to get that?

"A. Well, I was to get $20 a share on the stock that they had bought from Hample and Hamilton.

"Q. And that $20 was in addition to the $200 on what they had bought from you, was it?

"A. No, I don't think so.

"Q. Well, then, you were not—either you were or were not. I want to know which and I don't care a cent which it is.

"A. Yes, it was on the stock that they had bought. It all figured up that much; yes.

"Q. Then you were to get $20 on Hamilton's stock and Hample's stock, and Stanton's stock?

"A. Yes, sir.

"Q. In addition to the $200 on your stock?

"A. Yes, sir. [34]

"Q. And that figured up to just $576,400?

(Testimony of A. E. Kane.)

"A. Well, whatever it figures up.

"Q. Well, it does figure up to that, don't you know it? A. All right.

"Q. Don't you know it—you know I figured it all up with O'Hern, took me about two hours but I finally got him to it— isn't that a fact, that is what it figures to? A. The figures are right there.

"Q. It figures up to the price stated in the contract, doesn't it? $576,400, doesn't it?

"A. Something over $500,000.

"Q. Doesn't it figure up to the price stated in this contract between Armours and you, $576,400.

"A. Yes, sir; that is it.

"Q. So, then, instead of fixing a lesser sum of what you were to get for all of this goodwill, staying out of business, and guaranteeing accounts, and so on, instead of doing that you said, Now, you have got to give me $220 for my stock and then you have got to give me $20 a share on Hamilton's and Hample's stock?

"A. No, sir; nothing of that kind ever said.

"Q. All right, we will pass that. 'And in addition you have got to give me four months to speculate on the other fellows who haven't got in yet.'

"A. That was their proposition and not mine.

"Q. And you took it? A. Yes, sir. [35]

The plaintiff offered in evidence a contract between the defendant and Armour & Company, dated May 21, 1917, the same being admitted and marked Plaintiff's Exhibit 1.

The material portions of the said contract are as follows:

Plaintiff's Exhibit No. 1.

AGREEMENT.

THIS AGREEMENT, made and entered into this 21st day of May, 1917, by and between E. H. Stanton of Spokane, Washington, hereinafter called the first party, and Armour & Company, a corporation, hereinafter called the second party, witnesseth:

The first party agrees to sell to second party Two Thousand Four Hundred Twenty and two-thirds (2,420 2/3) shares of the capital stock of the E. H. Stanton Company, a corporation for the sum of Five Hundred Seventy-six Thousand Four Hundred ($576,400.00) Dollars, and said second party agrees to purchase of said first party said above mentioned stock at said purchase price; the purchase price to be paid as follows, to wit: Seventy-eight Thousand Four Hundred ($78,400.00) Dollars paid in cash to first party on or before June 1st, 1917, and notes aggregating Four Hundred Ninety-eight Thousand ($498,000.00) Dollars signed by second party and made payable to first party shall be delivered at the same time. Said notes shall each be dated May 25, 1917, and shall bear five per cent (5%) interest payable upon the dates following:

> There is here set out a list of notes payable at various dates between May 25, 1918, and May 25, 1921.

Second party further agrees to purchase from first party at Two Hundred Twenty ($220.00) Dollars per share, [36] payable in four annual installments, to be evidenced by promissory notes, any fur-

ther stock of the E. H. Stanton Company regardless of the purchase price said first party pays for such stock. This offer to remain open for a period of four months from date hereof.

In consideration of this agreement, first party agrees that no dividends will be declared by the E. H. Stanton Company until after the sale of his stock to second party has been consummated.

In consideration of the purchase price paid him by second party, first party agrees that for a period of ten years from date hereof, said first party will not engage in Montana, Oregon, Idaho or Washington either as owner, manager, employee or stockholder in a like or similar business to that now carried on by the E. H. Stanton Company, a corporation.

The first party guarantees the payment to second party of all accounts receivable of the E. H. Stanton Company as they appear of January, 1917, and those accrued, less the amount collected by second party on accounts which have been heretofore *been* charged off to profit and loss; that is to say if the losses on the accounts receivable exceed the amounts collected on accounts which have been previously *been* charged off to profit and loss, first party will pay the difference to second party.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands the day and year above written.

E. H. STANTON,
First Party.
ARMOUR & COMPANY,
By GEORGE B. ROBBINS, Vice-Pres.,
Second Party [37]

Testimony of Don Kizer, for Plaintiff.

DON KIZER, a witness called and sworn on behalf of the plaintiff, testified on direct examination as follows:

I left Spokane and went to Butte, arriving there on June 16. I left Butte on Saturday night, June 23, 1917. Mr. O'Hern arrived in Butte on June 21, 1917, two days before I left. I left before he did. Mr. O'Hern is general superintendent of Armour & Company.

Testimony of Fred B. Grinnell, for Plaintiff.

FRED B. GRINNELL a witness called and sworn on behalf of the plaintiff, testified on direct examination as follows:

I am a broker living in Spokane, Washington, and the president of the Fred. B. Grinnell Company.

(By agreement of counsel there was thereupon introduced in evidence and marked Plaintiff's Exhibit 2, an option contract, as follows:)

Plaintiff's Exhibit No. 2.

"Spokane, Wash., May 8, 1917.

Fred B. Grinnell, Esq.

Spokane, Washington.

Dear Sir:

Regarding situation of which we have been talking to-day beg to say the situation is about as follows: The capital stock is $600,000, Being 6000 shares par value $100.00 per share, plant $300,000.00 (cash $600,000.00) Stock on hand $800,000.00. Book

(Testimony of Fred B. Grinnell.)

Accts. $300,000.00. Total assets $1,400,000. Liabilities $285,000.00. I own or control 5084⅓ shares of the capital stock and hereby give you an option and agree to deliver same to you at any time on or before fifteen days from to-day upon the payment to me in cash of $220.00 per share. Also understood will give you whatever means that are necessary within this time for investigation of entire situation. I further agree to pay you (2) Two percent commission for selling stock of E. H. Stanton Company.

E. H. STANTON.

Witness:

ROBERT W. GRINNELL." [38]

This option was taken out at Mr. Stanton's office and my nephew, Robert Grinnell, wrote it. Mr. Stanton gave us the figures contained therein. It was signed by him on the day it bears date and was immediately telegraphed to Armour & Company at Chicago. Mr. Robbins, vice-president of Armour & Company, arrived here the Sunday following May 8, 1917, that is, May 13th, and the Monday following the general superintendent and auditor came. I took them out on Monday morning and introduced them to Mr. Stanton and left them there at the plant. Mr. Stanton said: "I want to make the best trade I can. I want to handle this thing and when I get through I will pay you as I agreed to."

Later that week they went over to Seattle. I was in consultation with Mr. Stanton almost every day concerning this deal. I knew when the deal was closed and Mr. Stanton told me he got less than $200

(Testimony of Fred B. Grinnell.)

a share for his stock and that the people who owned a part of the stock included in the option refused to pay commission on their share of the trade. I first found out in June, 1919, from information given me by Mr. Hample in Butte, Montana, anything different about the transaction. I was at Mr. Stanton's house on Sunday night, the night before the deal was closed, and talked with him concerning this deal in a room by himself.

Testimony of Robert Grinnell, for Plaintiff.

ROBERT GRINNELL, a witness called and sworn on behalf of the plaintiff, testified, on direct examination, as follows:

I drew the option agreement from Mr. Stanton which is Plaintiff's Exhibit 2 from information given us by Mr. Stanton. After the deal was closed Mr. Fred B. Grinnell and I talked with Mr. Stanton about our commission. He told us he only got $200 a share for his stock and that his associates wouldn't pay any part of the commission. [39]

Testimony of J. E. Hample, for Plaintiff.

J. E. HAMPLE, a witness called and sworn on behalf of the plaintiff, testified, on direct examination, as follows:

I reside at Butte, Montana, and have since 1896. I was one of the stockholders in the E. H. Stanton Company. I got my first stock in that company on the 1st day of January, 1906. At that time I got a third of one-half of the stock that was then issued.

(Testimony of J. E. Hample.)

Mr. Hamilton got the same amount at the same time. That is 250 shares and we paid $100.00 a share.

The next stock we got was in March, 1912. The company was in bad circumstances financially and Mr. Hamilton, myself and Mr. Stanton each agreed to take one-third of the stock that was then in the treasury and pay par for it. Mr. Hamilton and I paid for our one-third and Mr. Stanton gave a check for his. After we had gone he gave the company a note, and we did not know he had done so for something like a year afterwards. That note was never paid, and no interest was paid on it. That note was cancelled at the time of this transaction. Mr. Stanton, Mr. Fred Stanton and Mr. Hamilton and I were alone at Mr. Stanton's house on Sunday night, the 20th day of May, 1917. Mr. Stanton explained that Armour & Company were willing to cancel that note if they bought our stock, but they wanted the old directors to do so. Mr. Fred Stanton had a lead pencil and piece of paper, and he drew up something about it in writing and read it off, and said he would have it typewritten the next day, and if we sold out we could sign it. Fred Stanton claimed that Armour & Company's representatives told him how to word the paper which we drew up. I do not remember just how it read. After we sold out, Mr. Fred Stanton brought out the paper in Mr. Robbins' room on Monday afternoon, May 21, about five o'clock. I handed it over to Mr. Robbins and he said it was all right, understood by him, and we could sign it, and I did sign it at that time. [40]

(Testimony of J. E. Hample.)

On May 15, 1917, Mr. Stanton called me over the telephone from Spokane and said there were some parties here who wanted to buy the stock of the E. H. Stanton Company and said he was coming over to see Hamilton and myself about it. He came over the next day and got to Butte about 1 o'clock in the day time and left about 8 o'clock that evening. He told us he had a chance to sell out to Armour & Company and that they were looking over the plant and that he told them that he wouldn't sell his own stock unless they would take care of Hample and Hamilton. He said he didn't know what he could get for the stock, but that if he couldn't do better than $150 a share he thought he had better sell, and we told him $200 a share would be the least we would consider. He said he had to make a lot of improvements and that the Government had required him to put in concrete floors everywhere which would cost $150,000 or $200,000, and that he had a large amount of stock on hand and had a poor market for it.

He said if he didn't sell out they were going to start a plant themselves and that he would have to compete with them and that we would probably lose money if we were going to continue that way. I told him I was pretty busy, but that I would like to go over with him if I could arrange it. I went down to the depot to go with him, but the train had gone, so I sent him a telegram in care of the conductor to the effect that I would be in Spokane the next day. I don't remember what else was in the telegram.

(Testimony of J. E. Hample.)

Mr. Hamilton and I came over to Spokane together and reached here on May 18, 1917, between 9 and 10 o'clock in the morning. Mr. Fred Stanton met us at the train and we drove right out to the packing-house and met E. H. Stanton. Mr. Stanton took us over the place and showed us everything. He had made some improvements and we were very well pleased with them. He had a large amount of stock on hand and we were pretty well pleased and told him we guessed we would not sell out. [41]

We stayed at Mr. Stanton's house that night and until late on Saturday morning. He told us these people were going to make him a proposition and were looking the place over, but that he didn't know what it would be and that they only wanted to buy a certain amount of the stock and that he would not sell his stock unless we sold ours. And whatever he got for his stock we would get for ours, and he said that he would drive them just as hard as he could. He talked about the value of his stock and the circumstances to be met in the future, and said that if he could get $175 for his stock that he was ready to sell it. I told him "All right," that I would take it and pay him cash for it. At that he laughed and said that he might possibly do a little better. He told me his stock did not figure on the books over $184 a share and that there was a lot of things to be adjusted. I thought he was crazy for wanting to take $175 for the stock. I went in to see Mr. Roberts, his bookkeeper, and he told me the stock ought to be worth $250 a

(Testimony of J. E. Hample.)

share, book value of the stock and the increased market value of the goods.

I did not see Armour's men out at the plant. They couldn't have been out there very long. I saw some men leaving and was told they were Armour's men. I was up around the slaughter-house somewhere; I don't know where.

From the packing-house we went to his house with him and stayed all night. That night at his house Stanton said he would sell his stock and Mr. Hamilton's and mine together and wanted to do the trading, said he would make the hardest trade he could, and let us know what it was before he sold, and there was quite a lot of conversation regarding selling out. We talked till about two o'clock and so didn't get up very early. After breakfast Mr. Hamilton and I came up town and we didn't see Mr. Stanton until Sunday morning out at his house.

We went down to the Davenport Hotel to stay as we [42] didn't want to intrude on Mr. Stanton, and I accidentally became acquainted with Mr. Robbins there. I told him whatever trading he had to do he could do with Mr. Stanton. He said he didn't know what they would conclude to do, but that he had a man out in the country looking around, but that he hadn't made up his mind what to do. There was nothing said about price. He didn't say anything about a price or ask me about it at all. I did not see him again until up in his room Monday afternoon when I signed the contract. That conversation took fifteen or twenty minutes, perhaps, and I saw Mr. Robbins

(Testimony of J. E. Hample.)
at no other time, except in his room when the contract was signed while I was there.

Mr. Fred Stanton came to the hotel in the morning with his machine and said he had been looking for us in the evening before and could not find us and he wanted us to stay at the house, so we went for a drive out in the country with Fred Stanton and his present wife, now. Mr. Stanton came downtown with us and stopped at the bank, saying that he wanted to see Mr. Rutter about Armour & Company's notes; that Armour & Company didn't want to pay cash but wanted to give notes. I was satisfied with their notes, but it appeared that he wasn't. He was going to see Rutter about it.

Q. You thought Armour & Company's notes were good enough for you?

A. I didn't know what to do with the money after I got it.

When we got back to the hotel that evening we saw Mr. Stanton and he said he had been dickering with them all day, but had not been able to get them to come up. He said the best they would do, I think he said, was $190 a share. Mr. Hamilton spoke up and said he would not dicker on that, and he went and paid his bill and said he was going to leave that night for home. I had some other business to attend to so I told him I would stay a [43] day or two. Mr. Hamilton said he was going to pay his bill and go home that night. *After while* Mr. Stanton or Fred Stanton saw us again, and said they had gone up to $200.00 a

(Testimony of J. E. Hample.)

share and that some other things Stanton claimed talked all right now and if we would stay he thought he could make a trade. Mr. Stanton went and paid my bill and took me out home with him.

Monday morning we went out to the packing-house and stayed for dinner. In the afternoon we came downtown and Stanton, Fred, Hamilton and I went up to Mr. Robbins' room. Mr. Stanton told Mr. Robbins that he could make a contract with us at $200.00 a share. Mr. Stanton's lawyer, Mr. Kizer, was sent for, and he drew up a contract which we all signed.

This is the contract.

(Thereupon said contract was admitted in evidence and marked Plaintiff's Exhibit 3.)

Plaintiff's Exhibit No. 3.

AGREEMENT.

THIS AGREEMENT, Made and entered into this 21st day of May, 1917, by and between John E. Hample, of Butte, Montana, hereinafter called the first party, and Armour & Company, a corporation, hereinafter called the second party, witnesseth:

The first party agrees to sell to second party, Ten Hundred Ninety-six and one-third (1096⅓) shares of the capital stock of the E. H. Stanton Company, a corporation, at Two Hundred ($200.00) Dollars per share, and said second party agrees to purchase of said first party, said above-mentioned stock at said purchase price; the terms of sale being as follows, to wit:

(Testimony of J. E. Hample.)

First party shall deposit in the First National Bank, Butte, Montana, on or before May 25th, 1917, Ten Hundred Ninety-six and one-third (1096⅓) shares of the capital stock of the E. H. Stanton Company properly endorsed by said party [44] with instructions to said bank to deliver said stock to second party upon payment into said bank by said second party, to the credit of first party, the sum of Forty-three Thousand Two Hundred Sixty-six and 66/100 ($43,266.66) Dollars and four notes (4) signed by second party in favor of first party for Forty-four Thousand ($44,000.00) Dollars each, payable respectively 1918, two, three and four years after date, which date shall be May 25, 1917, bearing five per cent interest per annum, interest payable semi-annually. Second party shall pay said money and notes into said above mentioned bank on or before May 25, 1917, time being of the essence of this contract.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

JOHN E. HAMPLE,
First Party.
ARMOUR & COMPANY,
By GEORGE B. ROBBINS,
Second Party.

The contract was performed according to its provisions. Before we left the room after signing the contract they said they wanted to keep the deal quiet and didn't want anybody to know that they had

(Testimony of J. E. Hample.)
bought an interest or any part of the Stanton outfit. [45]

Mr. Hamilton and I went to supper with Mr. Fred Stanton and then he took us to the train. When we went down into the lobby we met Mr. Grinnell and he asked us if we sold our stock and we told him we hadn't, because Armour's men told us that they didn't want it known that they were buying. Mr. Grinnell said, "If you left your stock with me, I can sell it for $220.00 a share." About that time Fred Stanton came in and the thing was dropped and we went to supper. I had previously had some correspondence with Mr. Grinnell about a piece of land and he had introduced himself on Saturday at the hotel and asked me if I was still interested in this land, and I told him no, I was not. That was my only acquaintance with him. I first heard about the option to Grinnell in June, 1919, when I met him in Butte. That was the first intimation I had about an option.

On Sunday night when we went out to Mr. Stanton's house Mr. Grinnell came to the door. Mr. Stanton said that Mr. Grinnell was out to see him about the trade, and wanted some commission. He said it would not amount to anything, and that if he had to pay any commission it would come out of him; he had planned to cover it from the notes and automobiles that he had received, that he was to have, meaning the $25,000 note. That is the only time commissions were ever referred to.

The only conversation I had with Mr. O'Hern was

(Testimony of J. E. Hample.)
in the room the afternoon we signed the contract. He was in the room.

Upon cross-examination by Mr. POST, the witness further testified as follows:

I have been in the business of buying and selling hide and wool in Montana ever since 1879. I have also been in the sheep and butchering business. I have also been operating in other lines of business. I stay at the hotel which Mr. Hamilton owns and my room is my office. He has another room in the same hotel which is [46] his office. Mr. Hamilton and I have both been on the Board of Directors of E. H. Stanton & Company since 1915, at least. We received an annual report of the company's business at the end of each year. This paper is the report for the year 1916, which I received in January, 1917.

(Thereupon said report was marked Defendant's Exhibit 4, for identification.)

This report shows a surplus of $472,784.00 and that the net value of the assets is $1,727,000.00. I had received the report when Mr. Stanton was in Butte, and we looked for it, but couldn't find it. I told Mr. Stanton that I had given the First National Bank a statement for credit purposes, that the stock was of the value of $200 a share. I wanted to come over with Mr. Stanton, to look things over. I had told Mr. Stanton that I was busy at the time, and didn't think I could get away.

I sent him a telegram saying that I would be over the next day. I don't remember what else was in the telegram.

(Testimony of J. E. Hample.)

At the time I bought my stock, after I put my money into it, it might have been worth $150,000; yes, sir; that was January 1, 1906. Mr. Hample, Mr. Hamilton and Mr. Robertson who was the bookkeeper at the plant, kept in close touch with the business until about 1911. After 1911 we did not keep in touch with it In 1911 we reorganized and increased the capital stock to $600,000.00. Mr. Overholt managed it for a year or a year and a half. Stanton was not here part of the time, but he was in St. Louis sick one winter. After Mr. Overholt died, Mr. Stanton took charge of it exclusively from 1912 to 1917. Mr. Hamilton and I came over occasionally, once or twice a year. Under Mr. Stanton's management, the property grew to be worth over a million dollars. Mr. Stanton's salary during that time was $300 a month.

One of the Stantons said to us Sunday night that he [47] thought if we didn't go away a trade could be made. He said them fellows were talking all right that night, and that if we would stay until the next day we would be able to do business.

Upon redirect examination Mr. HAMPLE further testified: I received this letter from Mr. Stanton.

(Thereupon the said letter was admitted in evidence without objection and marked Plaintiff's Exhibit 5.)

Plaintiff's Exhibit No. 5.

Spokane, Wash., June 14, 1917.

Messrs. Hample & Hamilton,

Butte, Montana.

Gentlemen:

I have heard several times through different sources that you gentlemen are some what dissatisfied with your deal, Made in selling your stock you had in the E. H. S. Co. I would advise you not to talk to much until you know what you are talking about, you should congratulate *ourselves* on our sale. You are very licky and dont know it. I shall probly see you before long.

I remain resp. yours,

E. H. STANTON.

Testimony of J. L. Hamilton, for Plaintiff.

J. L. HAMILTON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I am 67 years of age and have lived in Butte, Montana, since 1875. I own real estate and a ranch and have a hotel there. At the time of the sale of the Stanton Company stock, I owned 1096⅓ shares. Mr. Hample and I took out the same amount of stock in 1906 and again in 1912. The company needed money in [48] 1912 and Mr. Stanton and we two took out equal amounts of stock, and Mr. Stanton owed the company $25,000 on his. Mr. Stanton agreed to put up the money the same as we did and we supposed he had until we got the next statement and saw that the company had let Mr. Stanton have the $25,000

(Testimony of J. L. Hamilton.)

more; that was the $25,000 note that was released at the time of this deal.

On Saturday, May 19, when we were in Spokane, Mr. O'Hern said that Stanton wanted this note released and that the old Board of Directors would have to do it. He also said that Mr. Stanton wanted the automobile. This was about 10 o'clock in the morning at the Davenport Hotel.

When Mr. Hample and I and Mr. Stanton and Fred Stanton were out at Mr. Stanton's residence this question was brought up and it is my recollection that Fred Stanton drew up a resolution with a pencil and paper. I am not sure that we signed it that day. It was passed and signed either Sunday night or Monday. I think the automobile was in the same resolution, but I am not sure. I think we said that the reason for releasing this was that Mr. Stanton might have some commission to pay and Mr. O'Hern told me that we could put that in as commission, compensation or anything we might think reasonable. He said we would have to assign some excuse.

The first thing I heard about selling the stock was on the 16th day of May, 1917, when Mr. Stanton was over at Butte. He said he had a good chance to sell and that we might not have another chance. He said he had to do a lot of work on the plant and that the competition was strong and that the Armour & Company or somebody might start on their own hook. We talked about the price. I got in about 2 o'clock in the afternoon and Hample and Stanton had talked before that. I was with them the rest of the after-

(Testimony of J. L. Hamilton.)

noon talking it over. He left that evening and I left Butte the next day and came over to Spokane with Mr. Hample. He did not mention [49] anything about an option at that time nor at any other time. No one else ever said anything to me about an option having been given. The price talked about at Butte was $150.

Fred Stanton met us and took us out to the plant where we met Mr. Stanton and looked things over and we thought things looked very nice. There was a machine drove up and two men got out and Mr. Stanton said, "That is the Armours. Now," he says, "Don't say anything to them about the deal, but let me do the trading and I will do the very best trade I can, and whatever you get I will get." He says, "I don't want to make a cent off of you and Hample." We went out with Mr. Stanton to meet them and were introduced to them. They were Mr. O'Hern and Mr. Robbins of the Armour Company. We talked with them a while and then they went away and went back to town.

We stayed out to the plant until closing time and then went home with Mr. Stanton. Went to his house and stayed there that evening and night. We talked over the deal with Mr. Stanton and about what we could get. I think Mr. Stanton said he probably could get about $175.00 a share. He said, "I might be able to work them up for a bigger price, but," he says, "I will press them just as hard as I can and whatever I get you and Hample will get." A bigger price than $150 a share, I said, "I won't take no $150

(Testimony of J. L. Hamilton.)

a share." I think he said he could probably get $175, and I think Hample said, "I would give more than that," or "I would give that," but Stanton says, "Whatever I get you and Mr. Hample will get the same amount. I don't want to make one penny off of you boys. I will press them as hard as I can."

The next morning was Saturday morning and after breakfast we came down town about 11 o'clock and went to the Davenport Hotel. Mr Stanton had gone out to the plant early. We met Mr. O'Hern at the Davenport Hotel when we first went down there. He [50] told me that Mr. Stanton was very unreasonable; that he wanted too much. "He wants a whole lot of things that is unreasonable. He wants his note cancelled, and he wants an automobile." He says, "If you people do come to a deal you can do that, but the old board would have to do it," and I says, "I figure that would amount to about $30,000." The $25,000 note and the one or two automobiles would probably amount, I figured, to about $5.00 a share on his stock. I do not know that I told O'Hern that. That is about all the conversation I had with him. I had no other talk with Mr. O'Hern except to talk with Mr. Robbins and Mr. O'Hern at the plant when we were introduced. I had no talk with Mr. Robbins. I did not mention to either one of them, nor did either one of them mention to me anything about the price of the stock. I was leaving Mr. Stanton to negotiate the sale of my stock and I took no part in it with them whatever. I talked with Mr. Robbins and Mr.

(Testimony of J. L. Hamilton.)

O'Hern at the plant and to Mr. O'Hern at the hotel and these were the only talks I had with them.

Sunday morning we went out to Mr. Stanton's house and had dinner and after dinner Fred and the young lady and Mr. Hample and myself with Mr. Stanton came downtown. Mr. Stanton got out at the bank. The rest of us rode around town until nearly night. Mr. Stanton told us that night they only wanted to buy 51% of the stock and he says, "I will do the best I can and whatever I can do you will get too. I won't sell my stock without they take all of yours and Mr. Hample's."

We met Mr. Stanton at the hotel Sunday night. He said the Armours won't raise their price to $190. "Well," I says, "I won't take that." Mr. Hample and I went up to the room at the hotel and talked it over. I told him that I was going home to Butte. I would not take $190. So I left him. He was going to stay. He has some other business. I went down to the hotel and paid my bill and got my grip and started out. About the time I [51] got to the door either Fred or Mr. Stanton came and says, "The Armours have agreed to give $200." I says, "All right, I will stay over," and we got in their machine and went out to Mr. Stanton's house. We stayed out at Mr. Stanton's house again Sunday night and while we were there someone came to the door and Mr. Stanton talked to him in another room. I understood that it was Mr. Grinnell. Perhaps Mr. Stanton said it was. Anyway, Mr. Stanton said this man thought he ought to have some commission and that

(Testimony of J. L. Hamilton.)

he was taking care of that, that it wouldn't cost us anything. He did not mention commission at any other time.

We went downtown Monday morning after breakfast. Mr. Stanton said the Armour people would meet us downtown that morning and fix it up. We went down to the hotel and waited a while and then called up Mr. Stanton and went out to the plant. After we had been there a while Mr. Stanton brought us in town and we went up into a room in the hotel and Mr. Stanton told Mr. Robbins and Mr. O'Hern that we would take $200 for our stock. Someone called up Mr. Kizer and Mr. Kizer came over and drew up the contract.

(It was thereupon stipulated that the contract between Mr. Hamilton and Armour & Company was the same as Plaintiff's Exhibit 3 except the escrow was to be held by the Bank of W. A. Clark & Brother instead of the First National Bank, and that the clause "time being the essence of this contract" is not in it.)

We signed the contract and went to Butte that night.

After signing the contract somebody talked to Mr. Hample there in the hotel that evening. Mr. Hample told me that it was Mr. Grinnell and that Grinnell told him he could get $220 a share for the stock.

After returning to Butte I deposited my stock in the W. A. Clark Bank. I left it there until the 31st day of May. At that time Armour & Company had not deposited their money and I took the stock out

and on the 4th day of June I sent a telegram to Armour & Company, of which this a copy. [52]

(The said telegram was thereupon admitted in evidence and marked Plaintiff's Exhibit 6 and reads as follows:)

Plaintiff's Exhibit No. 6.

Butte, June 4, 1917.

George B. Robbins,
Chicago, Illinois.

Your failure by ten days to comply with contract releases me, see letter copy sent.

J. L. HAMILTON.

The next day I received an answer to the telegram, which is Plaintiff's Exhibit 7, admitted in evidence. Said exhibit reads as follows:

Plaintiff's Exhibit No. 7.

119 chj 234 pm. 58.
AR US Uds Ills Jun 5 1917
Jas L Hamilton
Butte Mont

Your wire fourth letter not received contract provides for payment on or about May twenty-fifth therefore tender payment made in accordance with terms of contract particularly in view of fact that two sundays and a holiday intervened we acted in perfect good faith and I again urge you in all fairness to complete the trade as agreed.

G. B. ROBBINS.

After I sent my first telegram I received a telegram from Armour & Company.

(Said telegram was thereupon admitted in evidence and marked Plaintiff's Exhibit 8.) [53]

Plaintiff's Exhibit No. 8.

B72un da 39

Us Yards Ills 503P June 4 1917

James L. Hamilton

Butte Mont.

Upon my arrival home find through error your drafts and notes sent First National instead Clark Bank but since turned over to latter We apologize for trouble and request you immediately accept and deliver stock as per agreement advise.

GEO. B. ROBBINS.

437 PM.

The letter which he sent to Armour & Company of date June 4, 1917, is Plaintiff's Exhibit 9, admitted in evidence and marked Plaintiff's Exhibit 9.

Plaintiff's Exhibit No. 9.

Butte, Montana, June 4, 1917.

Armour & Co.,

Chicago, Ill.

Gentlemen:

On May 22d, 1917, I deposited with the Bank of W. A. Clark & Brother of this city, *then* hundred ninety-six and one-third (1096 1/3) shares E. H. Stanton Company Stock, as per contract with your Mr. Robbins at Spokane, Washington. Up until the close of the bank to-day, June 2d, Clark's Bank had not received or heard anything from your company. I, having complied with my part of the contract, to the letter, and your Company having utterly failed,

(Testimony of J. L. Hamilton.)

I took the stock out of the bank eight days later than the appointed time. I want to sell my stock, but want the same price that Mr. Stanton gets for his. I don't want Mr. Stanton to make twenty-five dollars per share on my stock. He told Mr. Hample and [54] myself that Two Hundred Dollars ($200.00) per share was the limit you would give and we were getting exactly the same as he was. I now find out, through Mr. Fred B. Grinnell of Spokane, that he had an option from Mr. Stanton on my stock, two hundred twenty (220.00) per share, that is, an option on five thousand and eighty (5080) shares at that price, and your Company was willing to take the said stock at said price. Mr. Stanton obtained permission to sell my stock by false representations and fraud of the worst kind. I am willing to let your Company get this stock if you want it at the price you pay for Mr. Stanton's stock.

Very truly yours,

J. L. HAMILTON.

Before taking my stock out of Clark Brothers' Bank I had legal advice from somebody in the bank. He wasn't a practicing lawyer and didn't charge for it. After getting that advice I took my stock out. In the letter of June 4th, Exhibit 9, I said I had found out through Fred B. Grinnell & Company that an option had been given. I had not talked with Fred B. Grinnell upon that subject. I cannot tell at this date who did give it to me unless I got it from Mr. Bender, who was over here the next day. He was one of the cattle buyers for the Stanton Company. He was in Butte on the 23d. He told me that it was

(Testimony of J. L. Hamilton.)

all over town that we had sold out, and I talked with him about an hour, but just what he did tell me, or whether he told me anything about that, I cannot say. I cannot now remember who gave me that information, but I know I got it from some source, and I did not get it until after I had left Spokane on the 21st of May. The first time I ever talked to Fred B. Grinnell in my life was in October, I think it was, in 1919, in Butte.

After this telegram and letter were sent Mr. Kizer came over to Butte as attorney for Armour & Company. That was on the 6th day of June. Mr. Kizer told me I would have to come through [55] according to the contract. I told him my attorneys advised me not to give it up and he threatened to start suit. I told him I would not agree to dispose of the stock, and we signed an agreement that I would not dispose of it until I had more definite information. He says, "If you will go to Mr. Currett or Sanders I will bet you $20 or $50 that they will advise you that you have got to give that up." He says, "All you can collect is perhaps some interest for the money during the time it wasn't there." I later employed Mr. Sanders and he gave me an opinion on the question. The opinion is Plaintiff's Exhibit 10, and the material portion is as follows:

Plaintiff's Exhibit No. 10.

"With reference to the controversy between you and Armour & Company over the contract, which was entered into on the 21st day of May, 1917, involving the sale by you of 1096 1/3 shares of the capital stock

of the E. H. Stanton Company, it appears that the original contract provided that Armour & Company should pay $43,266.66 and four notes of $44,000.00 each, bearing interest, into the banking-house of W. A. Clark & Bro. 'on or before May 25, 1917,' and said original contract contained the clause 'Time is of the essence,' etc., but the date of payment of the money and deposit of the notes being somewhat short, the contract was altered to read that Armour & Company should pay said money and notes into said bank on or *about* May 25, 1917, and the clause with reference to time being the essence thereof was stricken out. Thereafter, Armour & Company apparently not closely examining the contract deposited the money and notes with the First National Bank, where they remained until the fourth day of June, when Mr. Davis advised Mr. Johnston, of Clark's Bank that the money and notes were in his possession, requesting that Clark's Bank take them over, which Mr. Johnston declined to do, and thereupon advised you of his action which you coincided with, [56] declining to accept the first cash payment, or the notes, Armour & Company is now threatening to institute an action to compel you to comply with the contract and you desire to be informed as to the reasonable prospects of successfully defending the suit."

This opinion simply advises that the only legal damages sustained by Mr. Hamilton was interest on the amount that was to be paid from the day it was paid until it was actually tendered to him.

Some time after he was there I employed Mr. San-

(Testimony of J. L. Hamilton.)
ders and he gave me an opinion on the question.

On June 6, 1917, Mr. Hamilton wrote a letter to Don F. Kizer at Spokane, Washington, which said letter is Plaintiff's Exhibit 11, and is as follows:

Plaintiff's Exhibit No. 11.

June 6, 1917.

Don F. Kizer,
City.
Dear Sir:

In regard to our conversation of to-day in regard to the controversy over the contract heretofore entered into by me with Armour & Co., for the purchase by them of my holdings in the E. H. Stanton Co., of Spokane, Washington, I agree to give you a definite answer before June 16, 1917, and will not transfer said stock in the meanwhile to anyone except Armour & Co., and will not transfer it for at least four or five days thereafter, so that you may have an opportunity to commence suit against me for the enforcement of the contract, if your client desires.

J. L. HAMILTON. [57]

I got the Sanders opinion on either June 19th or 20th. It is dated the 18th and I paid for it on the 22d, as it appears from my check.

On June 14, 1917, Mr. Hamilton wrote a letter to Don F. Kizer, of Spokane, Washington, which is admitted in evidence and marked Plaintiff's Exhibit 12, and is as follows:

Plaintiff's Exhibit No. 12.

Butte, Mont., June 14, 1917.

Don F. Kizer,

Spokane, Washington.

Dear Sir:

My attorney advises me not to deliver the stock to Armour & Co., as they failed to live up to their part of the contract and for other reasons. He thinks the Court will say that ten days was not a reasonable time in which to comply with the delivery, as that was neglect in letting the notes and draft lay in another bank in the City of eight days.

Some of the points I told my attorney were: The cashier of Clark's Bank had my phone number to call me when the notes and draft reached the bank; I was in the City every day except one from May 25th until June 4th and no messenger called on me to inform me that the notes and draft were in the First National Bank, until June 1st. On June 4th the notes and draft were taken to Clark's Bank. I also told him I thought there was a conspiracy between Armour & Co. and Mr. Stanton to buy my stock for considerable less money than Mr. Stanton was to get for his; that Mr. O'Hern assured me that Mr. Stanton would not get more than Five ($5.00) Dollars per share more, as he, Mr. Stanton was to pay a commission. I waived the point; that Mr. O'Herron said, they (Mr. O'Herron and Mr. Robbins) had packed their trunks and would leave that night, and if we did not sign up, the deal [58] was off. Also that the erasing of the clause in the contract was sim-

(Testimony of J. L. Hamilton.)

ply to give Armour & Co. sufficient time to get their papers here.

Armour & Co. need not be in a rush to bring suit, for I will give them a contract that I will not dispose of my stock to anyone else for three months and will inform them thirty days before I dispose of it, and they can buy it from me as cheap as they did from Mr. Stanton. I want them to get the stock if they want it and will not sell it to any of their competitors. If I don't sell to them, I will be their partner.

I was informed that Mr. Good wanted an option on the Overholt stock at Two Hundred ($200.00) Dollars. He is with Wilson & Co. I suppose Armour & Co. will not want to buy that stock for a year as Mr. Stanton has that time to deliver it to them. If that is not the case, you know where the stock is.

Yours very truly,

J. L. HAMILTON.

When Mr. Kizer came to Butte the second time I signed an agreement with him which is Plaintiff's Exhibit 13.

The contract was made the 18th day of June between Armour & Company of one part and Hamilton of the other; recited that Armour & Company were about to institute an action against Hamilton for the specific performance of a written contract between the same parties, dated May 21st, 1917, for the sale by the second party to the first party of 1096 1/3 shares of the capital stock of the Stanton Company and that it is the desire of the parties to obviate the necessity of an injunction restraining the second

(Testimony of J. L. Hamilton.)

party from transferring the stock during the pendency of the action, and it is therefore agreed that the second party shall deposit said stock in the bank of W. A. Clark and Brother to be [59] held there pending the final determination of the suit and that neither said deposit nor the execution of this instrument shall be construed as a waiver of any defenses.

On the 22d day of June, 1917, we signed another agreement providing that I was to deposit the stock in the Clark Brothers Bank, to be held there for six months and if the suit was not terminated by that time to remain there for four months in addition. Armour & Co. were to deposit a draft for the purchase price of the stock and four notes, to be held during the pendency of the action.

This agreement is Plaintiff's Exhibit 14. Afterwards, on the 22d or 23d day of June, my stock was delivered to Armour & Co. and they gave me a check and the notes for it.

My bank-book shows that the check for this 1096⅓ shares was deposited on the 25th of June and the notes were delivered to me at the same time. The 25th of June was a Monday. I have one note that has not been paid off. I left the others home in the First National Bank of Butte. They are put there for security. This is one of the original notes, which reads as follows:

$44,000. Chicago, May 25th, 1917.

On May 25th, 1920, after date Armour & Company promises to pay to the order of James L. Hamilton, $44,000 at the Continental & Commercial Bank in Chicago, Illinois, value received, with interest at the

(Testimony of J. L. Hamilton.)

rate of five per cent per annum, payable semi-annually.

(Signed) ARMOUR & COMPANY.
By FREDERICK W. DROWLE and
CARL HAZARD,
Assistant Treasurer.

Due May 25th, 1920.

They paid me $278.38 as interest. I delivered up this stock and took these notes and this check, because Mr. Sanders told me I had no chance to beat a suit and Mr. Kizer threatened to bring suit pretty near every day. [60]

The COURT.—Those notes and consideration for the second transfer was the same as the first?

Mr. GRAVES.—I will ask him about that.

Q. All of these notes are like this one that was introduced in evidence under date of May 25th?

A. Yes, sir.

Q. The same amount as called for by the original contract? A. Yes, sir.

Q. Do you know whether these notes and this check are the same ones that they had by mistake deposited in the First National Bank instead of in the bank of W. A. Clark & Company?

A. Yes, sir; the notes was—they tendered the money, but not the check, cash, but the note is exactly the same as the one that they tendered to me some time previously.

Upon cross-examination by Mr. POST, the witness further testified as follows:

I own three of four pieces of real estate in Butte,

(Testimony of J. L. Hamilton.)

I also own a grocery-store, a hotel and a ranch.

I saw the statement which Mr. Hample got from Armour & Co. in 1917.

Mr. Stanton seemed to be downhearted and depressed and said that they would have to spend a lot of money repairing the slaughter-house, and competition was very strong and that if he didn't sell now that they might never get another chance.

I testified in the Grinnell case that I sent Mr. Stanton a telegram and told him not to sell as I was coming over. That I would take the train the next night for Spokane.

We talked at various times with Mr. Stanton about the price at which this stock should be sold. I know that when we [61] were talking about $190 a share I told him I wouldn't take less than $200, and we fixed the price of our stock at $200.

The statements were sent to Mr. Hample, but I am in his office most of the time. His office is in my building.

The first time I saw Mr. O'Hern was on Friday and the next time I talked to him was on Saturday. I asked Mr. O'Hern how Stanton and he were progressing with the trade and he said Stanton was unreasonable and wanted a lot of things; he wants that note cancelled and two automobiles and is very unreasonable. He says, "If you people come to an agreement you can cancel that note." I thought it was strange that they were willing to give him about $30,000.00. And I figured out that that would be about $5.00 a share more than the $200 a share. I

(Testimony of J. L. Hamilton.)

just figured it up in my head. I don't know how much it would be. I know it would be more than that. And then he spoke about we could assign a reason as a matter of commission to be paid. I might have told Mr. O'Hern that I wouldn't take less than $200; I know I told Mr. Stanton I wouldn't, and I may have told O'Hern I wouldn't. O'Hern did not say to me what Stanton was asking for the stock. He just said he was unreasonable and nothing was said between O'Hern and me as to the price of the stock, no talk about $200 a share. He did not tell we what Stanton was demanding for his stock. He never said a word about guaranteeing the bills receivable, or anything of that sort. Stanton said nothing to me about it at all. He never said a word to me about guaranteeing that Stanton would never go back into the meat business.

I know this resolution in regard to the note was drawn up at Stanton's house Sunday night, and I may have signed it there. I was in Spokane on the 8th day of June; four days after I wrote this letter to Armours. I didn't see Mr. Stanton or Mr. Kizer while I was there, and I didn't try to locate them. [62]

On June 25th, I made a deposit in the bank of $49,192.27, that includes the forty-three thousand and odd dollars on account of this stock, and at the same time they also gave me either a check or a draft on account of the Overholt stock. That check was sent to Kidder & Peabody Company in Boston. They are stock brokers and I had been investing in stocks through them. My statement through them shows an

(Testimony of J. L. Hamilton.)

item of Armour & Company, $34,133.33. I got that check about the same time as I got the check for $43,000. It might have been a day or two after or before, or it might have been at the same time, I can't remember. When I referred to the Overholt stock in my letter to Mr. Kizer I must have known about the contract Mr. Stanton had with the Armour & Company. Somebody had told me about it, but I don't know who it was or when.

I got some other notes from Armour & Company which I have in my possession for them here in addition to the notes for the 1096⅓ shares. One of these notes read in evidence is as follows:

"$34,000. Chicago, June 21, 1917.

On June 21st, 1920, after date Armour & Company promises to pay to the order of James L. Hamilton $34,000 at the Continental & Commercial National Bank of Chicago, value received, with interest at five per cent per annum, payable semi-annually.

(Signed) ARMOUR & COMPANY.
By FREDERICK W. COWELL,
Treasurer.
By CHARLES E. HAZARD,
Assistant Treasurer."

I never asked Kizer any price for the Overholt stock. I did not refuse to sell the 1096⅓ shares unless he bought the Overholt stock also for Armour. I did not contend that I would not sell one bunch unless I sold the other. I didn't care whether I sold the 773 Overholt stock or not, but I knew I had to give up the other stock. Armour paid me by draft about $34,000

(Testimony of J. L. Hamilton.)

on account of the Overholt stock. That was deposited with Kidder & Peabody Company in Boston. I have their statement. (It is [63] produced.) It shows Armour & Company's draft for $34,133.33 on June 2d. I mailed it to them. It may have been some days after I got it. I do not know how long. I do not say positively I did not get the draft for $34,133.-33 the same date as the $43,000 *vhrvk.* I got it about that time. It might have been a day or two before, or it might have been after. I do not remember whether I turned over both bunches of stock at the same time or not.

On redirect examination the witness further testified:

This check of Armour & Company's was number 06077, dated June 19 for $34,133.33 on the National City Bank, New York City. I mailed it to Kidder & Peabody on June 26th. The original notes were turned over to me, according to my memorandum, on June 23. I listed the notes. These are the notes for the 1096⅓ shares.

Q. Did you also make a memorandum as to the date these original notes were turned over to you?

A. Yes, sir.

Q. What date was that? A. June 23d.

Q. You listed the notes, did you? A. Yes, sir.

Mr. POST.—That is the note you have referred to in relation to the 1096 shares? A. Yes, sir.

Q. Have you got a memorandum as to when the notes were turned over to you? A. No, sir.

(Testimony of J. L. Hamilton.)

Q. You haven't any memorandum of that?

A. No, I haven't. I didn't keep any. [64]

Q. Is that the only book you kept? A. Yes, sir.

Testimony of William Huntley, for Plaintiff.

WILLIAM HUNTLEY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I owned 100 shares of stock in the E. H. Stanton Co. About two months after they bought Mr. Stanton's stock I sold mine for $220.

Mr. Post, attorney for the defendant, objected upon the ground that it was not material and does not make any difference what other people received for their stock.

The COURT.—The only question in my mind is whether it is not anticipating a defense. As I say, I think it will ultimately become material at some stage of the trial. He may answer the question.

Testimony of H. A. Roberts, for Plaintiff.

H. A. ROBERTS, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I was bookkeeper and secretary-treasurer for the E. H. Stanton Co. The general ledger shows that a note for $25,000 was given by E. H. Stanton to the E. H. Stanton Co. on May 18, 1912, and that that note was cancelled by an entry made under date of May 21, 1917, and charged to Administration Expense.

Upon cross-examination by Mr. POST, the witness further testified:

At the time I made that entry I had the resolution that had been passed by the Board of Directors.

(Testimony of F. M. Rothrock.)

They were in the minute-book of the company at that time. [65]

(Thereupon a certified copy of said minutes were introduced in evidence and marked Plaintiff's Exhibit 15.)

Plaintiff's Exhibit No. 15.

"As an additional compensation for services rendered to E. H. Stanton Co. since 1905, the Secretary-Treasurer is hereby authorized to cancel and return to E. H. Stanton his promissory note dated March 19, 1912, due on demand in amount of $25,000.00, made payable to E. H. Stanton Co. An entry crediting Bills Receivable and charging Administrative Expense is hereby authorized.

Testimony of F. M. Rothrock, for Plaintiff.

F. M. ROTHROCK, called and sworn as a witness on behalf of the plaintiff, testified as follows, upon direct examination:

At the time of the sale of the E. H. Stanton Co. stock to Armour & Company I owned 100 shares of the stock of E. H. Stanton Company. About the 1st of the following September I sold it to Armour & Company.

Q. What price did you receive from Armour & Company?

Mr. POST.—I object as immaterial at this time.

The COURT.—He may answer.

A. $250.00 per share.

Testimony of E. H. Stanton, for Plaintiff.

E. H. STANTON, called and sworn as a witness on behalf of the plaintiff, testified as follows:

I am the defendant. I sold the stock of T. J. Armstrong to Armour & Company.

Thereupon the plaintiff rested and the defendant introduced evidence as follows: [66]

DEFENDANT'S EVIDENCE.

Deposition of John E. O'Hern, for Defendant.

The deposition of JOHN E. O'HERN was read in evidence by the defendant and is as follows, upon direct examination:

I am the general superintendent of all of Armour & Company's plants and was such in 1917. In May, 1917, I was at Excelsior Springs and was instructed to go out to Spokane and look over the Stanton & Company plant with Mr. Robbins, vice-president of Armour & Company. Mr. White told me that I would meet Mr. Robbins there and would report to Mr. Robbins as to my estimate on the value. I understood there was an option on the plant.

On meeting Mr. Robbins we met Mr. Irvine, who in turn introduced us to Mr. Grinnell, and the four of us went out to see Mr. Stanton. I looked over the plant for a period of two or three days, during which time we had various conferences with Mr. Stanton asking for information. At the conclusion of that time Mr. Robbins told Mr. Stanton that we were not in a position to pay cash for the plant and also told him there was some book accounts we would have to

(Deposition of John E. O'Hern.)
know more about and would have to have a guarantee as to the reliability of these accounts, and suggested that we make an inventory and take the stock at inventory value. Mr. Stanton objected to that and said he did not want to sell that way, and the conferences finally wound up by Mr. Robbins stating that under the circumstances he was not prepared to buy.

A further conference that I had with Mr. Stanton indicated that Mr. Stanton was willing to sell and I believe that Mr. Robbins had some more conferences with him in regard to prices. [67]

Mr. Stanton went over to Butte or some place to see Mr. Hamilton and Mr. Hample. He came back in the morning, but we did not see him until afternoon, and he advised us that while he had heard these men were willing to sell, he heard later that they did not want to sell, but would be in personally. I saw Mr. Hample and Mr. Hamilton a day or two later. I cannot say what date this was closer than the second week in May.

Mr. Hample and Mr. Hamilton came to me one evening in the hotel and said they understood I was there to purchase the stock. I told them Mr. Robbins was negotiating and I was just inspecting the plant. There seemed to be some feeling between them and Mr. Stanton. They were together, but Mr. Hamilton did most of the talking. They said they did not give anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves.

Mr. GRAVES.—I would suggest we know who said it.

(Deposition of John E. O'Hern.)

The WITNESS.—Mr. Hamilton and Mr. Hemple were doing the talking, but Mr. Hamilton was doing most of the talking.

Mr. KIZER.—Q. They were together, were they?

A. They were together at this first conference, and they indicated that they had not given anybody any authority to sell their stock, and if the stock was sold they were going to sell it themselves; said they would like to sell direct to Armour & Company, and I said I did not see any objection to that, although the matter was being handled by Mr. Robbins, and that I would speak to him about it. I said, "In the meantime, you folks had better set a price on it so I can talk to him intelligently on it." They started asking a price—I think, although I am not certain about it, somewhere around $250 a share, and I told them that we could not consider anything like that, that I was told [68] by Mr. Robbins he had an option on the stock to buy it at $220 a share, and they said they had given no authority to anybody to sell their stock at $220 a share. I said, "All right, I just wanted to ask you before I say Mr. Robbins, what you want for your stock?" They got talking around, trading around—not necessarily trading, but discussing the value of the stock. I told them I was not satisfied the stock was worth the values they were setting on it. There was some assets there that might be of some value in addition to the stock. My notion of the stock was that it was not worth it. Of course, the usual trading, discussion that would ensue. I finally left them, when they had come down to about $220, and I

(Deposition of John E. O'Hern.)
told them I would take the matter up with Mr. Robbins. Mr. Robbins advised me that he had no objection to trading direct with them at all, but as far as price was concerned, why, to go further with them and see what I could do. They came around, wanted to sell their stock—pardon me, I had better go back a little further.

Mr. Robbins indicated, however, that he was not going to buy Hamilton's and Hample's stock without getting Stanton's stock, or somebody's stock sufficient to get a majority interest in this company. I advised them of that when I went back and told them that Mr. Robbins would deal with them direct if they would agree on price, and they said they were willing to sell if they could agree on price, and I told them that Mr. Robbins was not going to buy Stanton's stock by itself, or their stock by itself. My suggestion was that the three of them get together as to whether they were going to sell or not, and then we would deal with each one individually as to their stock. They advised me that they had some conferences with Mr. Stanton, and I think we had two or three conferences in the period intervening. They came back a day or so before the deal was finally closed and said to me they were willing to sell their stock for $200 a share provided [69] Stanton got no more for his stock than they got for theirs; and I advised them that there was some features in connection with this deal that I wanted cleared up. Mr. Robbins had indicated in a conversation that I had with him that he was not going to buy this stock without some guaranty that

(Deposition of John E. O'Hern.)
the book accounts—that was usual in buying stock—that those book accounts be guaranteed. There was book accounts amounting to over $350,000 there, that we wanted some guarantee on them, and asked them if they were willing to guarantee it. They said no, absolutely, they would not. I told them we also wanted that Mr. Stanton would not go into business in the immediate vicinity for a limited period of time, and if they would guarantee that he would not do it. They said they would have nothing to do with that; wouldn't do that. We told them we wanted Mr. Stanton's services for a period of from three to six months, possibly constantly, and for at least a year in an advisory capacity, or subject to our call if we needed it. I asked them how they felt about that, and they said they would not assume any responsibility for that. We told them we felt it was necessary to have Mr. Stanton stay with us for that period of time, that we were entire strangers in that community; that his knowledge of the plant and local organization, customers, distribution of its products, the marketing of its products, and the buying of his livestock, as well as his acquaintance among the livestock buyers was considerable of an asset; acquaintance among the livestock buyers was a larger asset in the Spokane plant than it would be in ordinary plants where we buy direct on the market. He was then buying direct from the producer. We also told them that in the meantime I had learned that there was a dispute about some commission on an option that we had when we came there, and that there was an argument about

(Deposition of John E. O'Hern.)

that. They said, "We didn't known anything about it, we won't pay any commission on any option; we had no authority to make any, and [70] we won't assume any responsibility on it." "Well," I said, "under those circumstances, I am going to be candid with you. If we buy this plant from Stanton, we are going to pay him more money for those features. We are not going to buy the plant—at least Mr. Robbins advises me he will not, unless those features are taken into consideration." They asked me then how much more Stanton would get for his stock, and I told them that was a question we would have to consider personal. In the first place, I did not know, whilst Mr. Robbins had expresses an opinion as to what he would do in the matter; that we had come to no conclusion with Mr. Stanton, and we did not know just where we would get at that, but anyway it was a matter I wanted to be frank with them and tell them they were not going to get the price Mr. Stanton would, or we would not purchase from Mr. Stanton unless we got an agreement from him that he would guarantee these accounts and accede to these other features Mr. Robbins had indicated.

During this interval I had been inspecting the plant, estimating the stocks, looking over the property and forming estimates on property and real estate, and we had an accounting man go through the books, and Mr. Robbins and Mr. Scribner and myself were in conference a couple of times a day, or at least, every evening, analyzing the result of Mr. Scribner's and my investigation.

(Deposition of John E. O'Hern.)

Mr. Stanton was holding off for what I thought was excessive prices for the features we were asking for, such as a guaranty of the book accounts and the other features. He finally agreed that in the event the deal was made he would assume all responsibility for the book accounts; he would stay with us, subject to call for a year, and stay two or three months longer on the plant every day we desired. [71]

Q. Was there anything in the agreement about his staying out of this field of endeavor for a while?

A. Yes, I spoke to him about that. He said there was no danger of him going into that business. He said, "I am selling out to get out. I have never been more successful in my life than I have been in the last two or three years, and I don't want to stay in this business, and prices are high and I don't know of any better time to get out than now. I will be candid with you and say that I would not sell out if I saw any prospects of continuing this business with my son taking ahold of it. But," he said, "he did not seem to be inclined to it," and he had been hammering away on it for a number of years, and he felt that he ought to take a rest, and he could not leave the plant and do that. He said he would be willing to guarantee that because he was going out of the business for that reason.

From the conferences I had with Mr. Stanton I had reported to Mr. Robbins that I thought we would not have much trouble in getting together with Mr. Stanton. Mr. Stanton had indicated that he wanted a price that was in excess of the option price, but that I had

(Deposition of John E. O'Hern.)

shown him how ridiculous it would be for Mr. Robbins to make any deal and to go back to Chicago and pay any price that would be in excess of the option price that was originally agreed upon. Finally Stanton says, "I will tell you what you do," he said. "I don't think we will have any trouble trading. There are some few things we can give and take on. You fellows are on the square. We will be able to trade." So I reported that to Mr. Robbins. Mr. Robbins said, "All right, see the other fellows and see what they want to do."

The WITNESS.—I know they came in one morning, Mr. Hample and Mr. Hamilton. I know they came in in the morning, accompanied by Mr. Stanton I believe. They said, "Well we are [72] ready to close up this deal; we will sell for two hundred, as we have been discussing." I said, "All right. Mr. Robbins handles that part of it; you will have to go up and see him." So I brought them up. In the meantime I telephoned Mr. Robbins. Well, I sent for Mr. Scribner, that they were down here and were willing to close up the deal and sell. He was up in his room. So that when they went up to the room the conversation from that time on was between Mr. Robbins and Mr. Hamilton and Hample and Stanton.

When I went to the room, Mr. Robbins was there; Mr. Hample, Mr. Stanton, and Mr. Hamilton accompanied me. Mr. Scribner came in later. I am not certain that Mr. Stanton was not there part of the time. After Mr. Hample and Mr. Hamilton had expressed their willingness to sell for $200 a share, Mr.

(Deposition of John E. O'Hern.)
Robbins said, "All right; there is nothing else to do but draw up the contract," and he said, "Your attorney will suit us"—Mr. Kizer.

We waited, visited around awhile until Mr. Kizer came over. He came over and got the terms of agreement and went back to his office and drew it up. I think it took maybe half to three-quarters of an hour or maybe longer while he was away, and we were visiting during that time. The contract, when brought back, was correct, I think, with the exception of one or two lines or one or two phrases that were eliminated, if I am not mistaken, because they had been discussing it pretty thoroughly and they were pretty well agreed upon what to do. I believe I suggested that maybe possibly on account of the mails that the date on which the stock was to be delivered at the bank,—we might not be able to meet it exactly, and that they had better extend that date, or something to that effect. I don't know whether that was actually made a part of the contract or not.

Then the agreements were all signed, and the suggestion was made that the stocks could not be deposited in the bank, and that the checks would come forward, and Mr. Hamilton handed the [73] stock over—offered it to Mr. Robbins, and says, "You might as well take the stock with you." Mr. Robbins said, "No, as a matter of business, you deposit it in the bank." Hamilton said he was willing to leave it with Mr. Robbins—

Mr. GRAVES.—I think that is unnecessary. He did deposit it in the bank.

(Deposition of John E. O'Hern.)

The WITNESS.—Yes. When that was concluded I remember a remark that Mr. Stanton made. He said, "Now, you fellows get out of here. I have got to make my deal."

Mr. KIZER.—Q. That is, he said that to Hample and Hamilton?

A. To Mr. Hample and Hamilton. Everybody laughed and shook hands, and they went out.

Q. Then did you make your deal with Mr. Stanton after they went out? A. Yes, sir.

Q. At the time they went out had there been a definite price agreed upon with Stanton for his stock and for the other considerations that he was giving?

A. There had been no definite price agreed upon. There was a trade being made on it. We were apparently close together.

Q. At that time what was he hanging out for?

A. He was hanging out for a round sum. He had mentioned a hundred thousand dollars. He had mentioned some other considerations.

Q. The question I was asking, Mr. O'Hern, was he holding out for this hundred thousand dollars in addition to the set price for his stock?

A. At this time I can't say whether—yes, in addition to stock, but I can't say at this time whether that was in addition to $200 or $220 a share for his stock. He knew what these other men were getting, and I had impressed on him at that time, before he came into the conference, that there was no use agreeing to deal unless he could go within the figures that Mr. [74] Robbins had mentioned to me, which was that

(Deposition of John E. O'Hern.)
he would not go beyond the option price—the aggregate option price for this stock.

Q. Then I take it that after Mr. Hample and Mr. Hamilton went out of the room you proceeded to dicker for his stock? A. Yes, sir.

Q. Just detail the course of those negotiations.

A. Well, the same features incidental to a contract were then discussed in a preliminary way with Mr. Stanton, particularly with reference to his staying with us in business, staying with us or being subject to call for a certain period of time, and for the use of his services during that time. With reference to the book accounts, the guaranteeing of them, he made a little objection to that, but Mr. Robbins pointed out to him that we knew nothing about the customers or his trade at all, and that we would insist on that; that there was too much on the books there for the small concern it was to think of taking a business over without knowing more about them, and they would not assume that responsibility. That was finally agreed upon.

In the trading, as it resulted, Mr. Stanton held out for the fact that he was not getting what he felt he ought to get. He suggested that this stock, some of this stock, should be bought cheaper, he thought, and Mr. Robbins said, "All right, if you can buy some of this stock cheaper, anything you get in addition to that we will take it off your hands at $220 a share." There was an automobile that figures were traded up and down for, and finally there was an automobile that entered into it that Mr. Stanton wanted for his

(Deposition of John E. O'Hern.)

son, which Mr. Robbins finally agreed with him that he could have.

(By Mr. KIZER.)

Q. That is an automobile which belonged to the plant? [75]

A. Yes. I think Mr. Robbins pointed out to him that there was a liability there, his personal account which was a feature. That was a company account which the directors had given him. That was an asset to him. That was something he had received that belonged to the company.

There was considerable trading, and they finally wound up and the figures agreed upon in there (indicating contract).

A. $576,400. Mr. Stanton was asking for more, but Mr. Robbins said it would be ridiculous to consider, that it would put him in a very ridiculous position to go back home and tell those people that he paid a larger price than the option originally called for.

Q. Mr. O'Hern, when was it you first saw Hample and Hamilton with reference to the date of signing the contract? Now, let me refresh your recollection if it will help any. You seem to be in some doubt about it. Isn't it a fact that on the morning this contract was signed Mr. Stanton brought them to your room and introduced them to you?

A. Oh, absolutely not. I had met those gentlemen a week before that. I believe you have reference to Mr. Robbins.

(Deposition of John E. O'Hern.)

Upon cross-examination, the witness further testified as follows:

There was no provision placed in the contract in regard to Mr. Stanton's agreement to give us his services so long as we should need them, for the reason that he had given us his word that he would do this and if later he decided he did not want to give his best efforts we had no way of making him do so whether it was in a written contract or not. In other words, if he was not willing to stay a contract would not hold him.

It appeared that the automobile which we let Mr. Stanton keep was one that had been used personally by Fred, and Mr. Stanton wished him to have it and we agreed that they would keep it. I am not certain whether a bill of sale was given or not. [76]

We put in the additional agreement that we were to pay Mr. Stanton $220 for more stock if he could get it because Mr. Stanton was demanding more than we were willing to pay. I told Mr. Hample and Mr. Hamilton that Mr. Stanton wouldn't sell his stock without somebody taking care of his commission and asked them if they were going to and they said no, that they had nothing to do with that; that Mr. Stanton could not sell their stock; that if they traded they would trade direct and that Stanton had no right to give an option. They talked about prices in excess of $220 and I told them it was ridiculous to pay above that and that the book accounts did not show the stock worth above that amount.

(Deposition of John E. O'Hern.)

Q. No, I am asking about you, not about Mr. Robbins now.

A. All right; absolutely not. I had met them all a week ahead of that.

The witness further testified that he met them in the hotel lobby, that he was uncertain whether Mr. Stanton or Mr. Kamareth introduced them to him or whether they introduced themselves; that he knew of the option and knew how many shares were stated in it, but that he did not now recall the number. He further testified that he checked up on the list of stockholders and that he assumed at first that Stanton owned the stock; that he was then informed to the contrary by Mr. Robbins; that afterwards he asked Mr. Stanton about it and that Stanton told him that a couple of partners of his who had originally been in business with him owned the stock, and he mentioned that he had no doubt that there would not be any trouble about selling their stock, that they were willing to sell.

The witness further testified that subsequently they bought all the outstanding stock of the Stanton Company, but that he does not know the price paid for it, as he did not himself complete the deal; that he had not looked into the books to see the total investment for that stock and could say nothing about it. Stanton had told the witness that Hample and Hamilton were coming to town; that between that time and the time they signed the contract Mr. Stanton talked to the witness about it; told the witness he was negotiating with them; did not tell [77] him what information he

(Deposition of John E. O'Hern.)
was giving them, that is to say, what information he was giving them concerning the deal between him and the Armours. He did not negotiate with them in Mr. Stanton's presence except at the time they signed the contract. They did not appear to be especially interested in what he was getting. They did not refer to the matter again after the talk in which he had told them that Armours was going to pay Stanton more than the others. He informed them two or three days before the deal was finally made that he would not deal with them on the basis he had dealt with Stanton. He did not tell them that anybody in the company was getting more than they were getting, did not tell them that everybody in the company was getting more than they were getting; he could not—did not know it; did not tell them that they were going to agree with Stanton to pay everybody in the company more than they were paid; did not tell them this after he found it out; did not put in anything about Stanton staying out at the plant for two or three months because they just took his word for it; did not have any separate contract with him for that; had no other writing with Stanton except the contract in evidence. Leaving it out of the contract was not discussed. Stanton said that night he would do it willingly without a contract and that if he was not willing a contract would not hold him. Mr. Kizer made no suggestion of putting it in; talked with Mr. Robbins about it.

The witness further testified as follows:

Q. Now, do you mean to tell us that you went on

(Deposition of John E. O'Hern.)

and closed up your contract with Hamilton and Hample without knowing whether you were going to be able to close with Stanton and what the terms with Stanton would be?

A. Yes and no. Mr. Stanton and myself had come to an understanding. We were not very far apart. Mr. Stanton's last word to me was, "You know what I want and I know what you are willing to give. Now, we will be able to fix this up if [78] these other fellows want to sell their stock."

Q. At that time you knew you were willing to pay and were going to agree with Stanton to pay $220 a share for all stock that he could get hold of no matter what it cost him? A. When and what time?

Q. At the time you told that to Hamilton and Hample. A. I don't know that.

Q. What?

A. I don't know that. We told him that he—I am not certain whether that was agreed to before or after.

Q. How long after you signed your contract with them did you sign up with Stanton?

A. About two or three hours; the meeting was continuous. I think we went out to lunch in the interval, or something like that, while the attorneys were drawing up the papers.

The witness further testified that amongst the notes payable was an item due by Stanton to the company for $25,000. The old directors of the Stanton Company voted to release him from it, to cancel it. The witness didn't recall if he knew it was being done,

(Deposition of John E. O'Hern.)

but did know Mr. Robbins told him about it and told him it was an asset of the company, one of the features that entered into the trade.

The witness further testified as follows:

Q. Do you mean to say that they canceled that note without consulting you about it when you were so very anxious to have all the accounts and notes receivable guaranteed?

A. This meeting was held subsequent to the trade, as I recall.

Q. Where was it held?

A. I don't know; my impression is it was held subsequent to any trade. [79]

Q. Then if it was held subsequent to the trade, you agreed to it, did you?

A. I don't know. I didn't know anything about is as near as I can recollect right now.

The witness afterwards said that he meant the meeting was held previous to the trade. His testimony then proceeded:

Q. How long previous to the trade?

A. I don't know.

Q. Were you cognizant of the fact that the meeting was to be held and what was to be done, and its purpose?

A. I don't know that I knew they were going to have a meeting even.

Q. Was the question of that assent discussed between Robbins and you?

A. Not until after it happened.

Q. Never was mentioned?

(Deposition of John E. O'Hern.)

A. Not that I know of until after it happened.

Q. They just went ahead and voted it out of the assets, although they had been trading with you?

A. I don't know.

Q. How? A. I don't know.

Q. You mean to say that Hamilton and Hample agreed to forgive the note, or whatever it was, of Stanton, without your knowing anything about it, and without the trade having been made or terms agreed upon, or anything?

A. Why, that is not an improbable situation.

Q. I am not asking you whether it is or not.

A. I am telling you I don't know about the meeting.

Q. Never heard of it? A. Not until afterwards. [80]

Q. Never heard about it?

A. No, sir; didn't know anything about it.

The witness further testified that nobody had ever mentioned the subject of that release to him and that he knew nothing about it. As to the automobile the witness further testified that they just agreed to turn it over to him; that there was no meeting of a board of directors on the subject and the other stockholders were not consulted. It was turned over outright to Stanton by him and Robbins; that there was no memorandum made on the books of the company.

The witness further testified that although they were going to stay within the $220 a share for this stock the price fixed in the contract with Stanton amounted to $238 and a fraction a share; that this

(Deposition of John E. O'Hern.)

figure was the result of trading. He then testified as follows:

Mr. Robbins had told me on Saturday that under no consideration would he agree to buy these shares where in the aggregate they would amount to more than $220 a share, or the option, and for that reason he judged it was useless to figure with Stanton on any other trade.

Q. For above $220? A. Yes.

Q. Well, but you did, though—now why?

A. I don't quite see that we did.

Q. Well, you agreed to pay him $576,400 for 2420⅔ shares; that is what your contract reads. I am talking of what your contract reads, which, according to the figures you just made for me amounts to $238 and a fraction, and I expect that we took that ⅔ shares, which would amount to $239 and a fraction.

A. The exact result of the negotiations with him is not clear in my mind as to how that was arrived at. [81]

Q. All you know is what the contract shows?

A. I know that Mr. Robbins had in his mind what I told you.

Q. Did you figure what his goodwill was worth, his agreement not to enter into competition with you in the states mentioned in this contract?

A. You cannot put figures on goodwill.

Q. I say did you?

A. We recognized it as an asset.

Q. Did you get any figure on the amount of it?

A. Oh, no. I don't think any two men can agree

(Deposition of John E. O'Hern.)

on what the value of goodwill is.

We did not put any figures on Stanton's services, although they had in mind what they would pay a manager; did not put any figures on the guarantee of the accounts, which amounted to about $350,000; that he had been informed at the office that Stanton had paid $5,000 in one item and $18,000 in another, and had taken over the accounts.

He was to give all his time to Armour & Company for three months and be subject to call six months or a year.

The witness then further testified as follows: [82]

Q. The total contract price you agreed to pay Stanton was $576,400. According to your contract now he had 2420⅔ shares. Hample and Hamilton, 2192⅔ shares, which at $220 a share amounted to $1,014,860. But you had already agreed to pay Hamilton and Hample $200 for that. I have disregarded the fractions, which in round numbers amounted to $438,400. Subtracting that from the total you have $576,400, or just $60 more than the contract price you agreed to pay Mr. Stanton for his 2420⅔ shares. I have no doubt if the figures were accurately made it would amount to just that sum. There is a fraction comes in there which I have disregarded in getting up these figures. Now, are you prepared to swear upon your oath that that is a mere coincidence? A. I am not.

Q. Are you, then, prepared to admit that Stanton's stock was figured on the basis of $220 for his and $20 a share for Hample and Hamilton's?

A. It could not possibly be done that way when

(Deposition of John E. O'Hern.)
he assumed the obligations and the automobile entered into it and his services entered into it; that was not the full amount we paid him. [83]

Q. Why is it it comes out that way,—is it just a coincidence?

A. I can tell you what I replied before—that Mr. Robbins said he was not going beyond the contract price of the stock he bought in this city and he would not go beyond it.

After some other questions and answers, he testified as follows:

Q. You do not quite get the force of my question, I see, Mr. O'Hern.

A. Possibly not.

Q. What we charge to be the fact in this lawsuit and what I am trying to get at is that you paid Stanton in figures now—I don't care what you call it—you paid him in figures $220 a share for his stock and $20 a share for Hamilton and Hample's stock. Now you say that was not so, do you?

A. I say it was not so because the facts are here in the contract.

Q. I don't care about the reason.

A. The contract does not read that way.

Q. I understand. Is that all you know about it?

A. I know what the contract reads here and I know the prices and figures we agreed upon.

Q. Precisely so.

A. It may have amounted to that much, but that was not—

Q. You have said to me that you did not figure any

(Deposition of John E. O'Hern.)

particular amount that his goodwill was worth by staying out of business in these states, you did not figure up any particular amount that his services were worth though you had in mind the general notion of what you would have to pay a man, and you did not figure up any particular amount of what his guarantee of the outstanding accounts, bills and notes receivable was worth, but [84] it was kind of lumped together. I think that is stating your answer. Are you certain now, sir, in figuring this, getting up that sum, you did not take as your basis $220 for his stock and $20 for Hample and Hamilton's stock? A. You mean to arrive at his $576,400?

Q. Yes.

A. It is possible that is what the result of that was.

Q. That is the way you figured it?

A. Well, as far as that being the way we figured it, I had this in mind.

Q. Pardon me, Mr. O'Hern, but I am not particular about what you had in mind. I say is that the way that Stanton Robbins and you figured it?

A. I say positively no, I did not, if you want a direct answer.

Q. Then, will you please explain to me why it is that the figures come out that way. Is it just a mere coincidence?

A. It was not a coincidence. You would not let me tell what I think brought it about, and for that reason—

Q. All right, you may tell that now, if that will help us any.

(Deposition of John E. O'Hern.)

A. Mr. Robbins had set his mind on this fact; that he was not going to pay anything in excess of the amount that he had originally come out there to pay for stock, for buying a majority control of the stock in that plant.

Q. Well, had he set his mind that he would go the full price fixed in that option?

A. Not when he went out there.

Q. No, but when he made this contract.

A. As a result of my report to him he had set his mind on it that he would go that full price and buy it as much cheaper as he could. [85]

The witness further testified as follows:

Q. Now, will you admit, Mr. O'Hern that, whatever your intention was—I don't care anything about that—but as a fact, that in this contract you say you made with Stanton, he was given the benefit, under whatever name you called it, of precisely $20 a share on the Hample and Hamilton stock?

A. Personally I had in mind that we had that advantage in the other trade and that we had that much to trade on in trading with Stanton; yes, sir.

Q. Yes. Therefore, then, you intended to pay Stanton and Stanton intended to get $220 a share on the Hample and Hamilton stock?

A. Your question that I intended or he intended to get is not correct.

Q. That was the purpose, wasn't it?

A. Well, what we did and what we intended are two different things. What we finally agreed on was the limit that we were to go.

(Deposition of John E. O'Hern.)

The witness further testified that the sum of $576,400 was reached by paying $220 a share for Stanton's stock and $20 a share for Hample and Hamilton's; that was the basis because it was the point which Mr. Robbins said he would not go beyond.

Q. Did he tell you the amount of that commission—five per cent? A. I don't think he told me.

Q. You were informed of that in the option; it is stated in there?

A. It is possible I was, and I won't deny that I did see the option. I don't recall right now. [86]

Q. Two per cent—I beg your pardon, yes, two per cent. Pay you two per cent commission for selling the stock.

A. It is possible I saw that, but I do not recall.

Q. You said something to Hample and Hamilton about that, you say?

A. I told them, I said, "You fellows are arguing here, the three of you are in a scrap; you want to sell us your stock, and Mr. Stanton won't *w*ell us his stock without somebody taking care of his commission." I said, "Are you going to take care of this commission?" He said, "No, we have nothing to do with it. We won't sell it. We won't trade under that condition."

Q. That was on the basis of 200?

A. On the basis of the option. They said Stanton could not sell their stock, they would not trade, that is buying through Stanton at all. "If we would trade, we would trade direct. Stanton had no right to give an option."

(Deposition of John E. O'Hern.)

Q. Did you tell Hample and Hamilton that this outstanding option that Stanton had given on 5084⅓ shares was at $220 a share?

A. It is possible I did, although I don't recall that I did. I think I mentioned it, because when they asked about prices in excess of $220 a share I told them it was ridiculous and that we would not think of paying anything above the 220; that we came out here on what I understood was an option for 220; and would not consider it. They repudiated the option then. [87]

Q. You said you would not pay above 220 and thereupon they shortly turned around and took 200?

A. Please give me that question again.

Q. I say and thereupon they shortly turned around and took 200?

A. I told them the maximum price that we would possibly pay would be 220, and we were going to buy as much better as we could. I further told them that the book accounts did not show the stock was worth that much.

Q. Did you? A. Yes, sir.

Deposition of George B. Robbins, for Defendant.

GEORGE B. ROBBINS, called and sworn as a witness for defendant, his testimony being taken by deposition, testified as follows upon direct examination: [88]

I am vice-president of and a director of Armour & Company. I was in Spokane on May 21, 1917, and saw Mr. Hample and Mr. Hamilton at the time the

(Deposition of George B. Robbins.)

contract between Armour & Company and Hamilton and Hample was signed.

After that contract was signed Mr. Stanton said to them in effect that if they would leave he would proceed to make his contract with us.

Upon cross-examination the witness further testified as follows:

My maximum of what I wanted to pay on this stock as a whole was $220 a share. While the option itself had elapsed in my opinion, I knew the people at home had that figure fixed in their mind and I thought I would have to let the trade drop rather than have paid any more than that for the stock.

I found that Mr. Stanton was not willing to take $220 for his stock. He had refused to do so in view of the guarantee and the limitations which we required to be a part of the trade. When I was told by Mr. O'Hern that Hample and Hamilton would probably take $200 for their stock, I could see a chance to trade increasing the payments to be made to Mr. Stanton.

When Mr. Hample and Mr. Hamilton came to my room that morning I said, "I am informed by Mr. O'Hern that you are willing to take $200 for your stock." One of them said, "Yes, sir." I turned to the other gentleman and asked the same question. He said, "Yes, sir." "Well," I said, "I guess there isn't any occasion to prolong this meeting. We will sent for an attorney and let him draw up an agreement to that effect."

Mr. Stanton wanted $100,000 more or less for the

(Deposition of George B. Robbins.)

other things and I explained to him that I would not under any circumstances pay over the average of $220 for the stock. If Hamilton and Hample had demanded $220 for their stock from me there would have been no trade. The thing would have ended there and there would have been [89] trade and we would have gone home. If I got the stock of these two men I could have gotten a control of the stock without Mr. Stanton.

Testimony of E. H. Stanton, for Defendant.

E. H. STANTON, the defendant, called on his own behalf, testified as follows:

I am 59 years of age and I have been in the meat business 25 or 40 years in New Hampshire, Colorado, Montana and Washington. I met Mr. Hample and Mr. Hamilton while in Montana and then afterwards I came to Washington. I think it was in 1888. I started a retail butcher-shop in Sprague, Washington. In 1896 I came to Spokane and started a butcher-shop and in 1904 I started the E. H. Stanton Company with a capitalization of $150,000. In 1906 Mr. Hamilton and Mr. Hample and Mr. Montgomery bought 750 shares of stock and paid par for it. Of that $75,000, $55,000 went into the treasury of the company and the balance went to me. Hamilton and Hample have been stockholders ever since. Montgomery afterwards sold out. In 1909 the capital stock was increased to $600,000 and the stockholders were paid a stock dividend of $350,000. In 1910 we built a large packing plant east of the city.

(Testimony of E. H. Stanton.)

In 1912 Mr. Hample, Mr. Hamilton and myself each bought $25,000 worth of the treasury stock and paid cash. I borrowed $25,000 to pay for mine and later I borrowed money from the company and gave my note in order to repay the note. Mr. Hample and Mr. Hamilton knew of this and never made any complaint. During this time I was sole manager. I went to work at the plant at 5 o'clock in the morning and left there between 6 or 7 o'clock in the evening, week days. I observed the Sabbath; I went to work at six o'clock on Sunday and left there about two o'clock. Mr. Hample and Mr. [90] Hamilton had nothing to do with the management of the business. They came over to Spokane from time to time and I would tell them as near as I could all about everything and all about the business. From 1906 until I sold out I was drawing a salary of $300 a month.

My attention was called to the prospective sale to Armour & Company about the 8th day of May, 1917. A short time before that I had given Wilson & Company an option on the stock at $200 a share and they turned it down. On May 8, 1917, Mr. Fred B. Grinnell brought it to my attention that a sale might be made with Armour & Company and I gave him an option on a portion of the stock.

On Monday, May 14, 1917, Mr. Robbins, Mr. O'Hern and Mr. Van Kleek, Mr. Grinnell and Mr. Irvine came out to the plant. Mr. Robbins returned to town and Mr. Van Kleek and Mr. O'Hern spent the entire day looking over the plant. I did not go with them

(Testimony of E. H. Stanton.)

and there were no negotiations that day about a purchase.

About 9 o'clock the next day Mr. Robbins and Mr. O'Hern came out and said that they had decided they were not interested in the option; that the stock was not worth $220 a share; and that they did not have the cash to buy the plant. They said that they thought there was no need of any further investigation; that they had decided to go to Seattle that night and expected to see Mr. Fry. I knew that Mr. Fry was in the market to sell his plant in Seattle. I suggested to them that I go over to Montana and see Mr. Hample and Mr. Hamilton and if I thought things looked in shape to make a trade I would send them a telegram, and they agreed to that. They said they would stop at the Hotel Fry, in Seattle.

I went to Butte that night and saw Mr. Hample and Mr. Hamilton the next day. I explained to them that there was a prospect of making a sale to Armour & Company; that conditions were unsettled; that livestock was going higher and that we had a big stock of frozen meat on hand; that a lot of repairs had to be made [91] which would cost not less than $150,000. I told them I thought it was a good time to sell out. I told them that Armour & Company had 7 or 8 wholesale markets, one in Portland, Seattle, Tacoma, Los Angeles, Bellingham and Butte, and that they needed a plant in this part of the country to supply these houses and that if they couldn't buy our plant the chances were that they would build one of their own. I told them that if they did build here Armour & Com-

(Testimony of E. H. Stanton.)

pany would be a hard competitor. We discussed how much harder it would be to do business and they seemed to agree with me. We talked about six hours. Before I left that night we decided to take $150 a share if we couldn't get any more.

About 12 o'clock that night the conductor came to my berth and gave me a telegram from Mr. Hamilton and Mr. Hample. The telegram read: "Positively do not sell out stock. We will attent to that ourselves."

When I reached Spokane in the morning I received another telegram from Mr. Hample. That one said, "Positively do not attempt to sell our stock. Jim and I will leave for Spokane to-night." Jim is Mr. Hamilton's first name.

After I returned to Spokane I telegraphed to the Armour & Company people to come back and they reached here Friday morning. Mr. Hamilton and Mr. Hample also reached here Friday morning.

When Hample and Hamilton came out to the plant I asked them if they thought I was going to sell out and skip the country. They said, "No, we didn't think that, but we thought you were getting cold feet, and we thought we would come over and tend to this business ourselves."

I told them I was going to sell out and that they could suit themselves. If they wanted to sell they could but I was going to sell mine anyway.

I took Mr. Hamilton and Mr. Hample around through the [92] plant and showed them everything. I didn't tell them I would sell their stock for them. I didn't feel that way about it right then,

(Testimony of E. H. Stanton.)

nor did I tell them I would get as much for their stock as I did for my own. I didn't conduct any negotiations for them with Armour. They did their own negotiating themselves.

Friday there was nothing further said about a sale. Mr. Van Kleek and Mr. O'Hern were looking over the plant. Saturday morning they said to me that they thought Hample and Hamilton would sell their stock at $200 a share, and I said, "I am glad to hear that." Sunday morning they came out to the plant again. Mr. O'Hern said they thought they could make a deal with them and that he would like to see me at the hotel that evening at about seven o'clock.

I met him accordingly and we talked the matter over quite fully. He said that they had concluded to take our stock at $200 a share but that they wanted me to agree to stay out of the meat business in this part of the country and to guarantee the book accounts and to also remain and assist them at the plant for a time. That didn't sound very good to me and finally he said they might consider giving me a small consideration for that and I told him I would let them know the next morning.

Monday morning Mr. O'Hern came out to the plant between 7 and 8 o'clock and I told him I would do what they wanted for $100,000 in excess of what they wanted to pay for the stock. Mr. O'Hern said that he was sure that Mr. Robbins would not consider such a proposition for a minute, but that he would go back and see what he said about it. He went back to town and at about 11:30 that forenoon called me over the

(Testimony of E. H. Stanton.)

phone and asked me to come down to the hotel at about 2 o'clock.

Hample and Hamilton were out at the plant at that time and I told them I thought Armour & Company were figuring on [93] closing up with us and that they wanted us to come in, so we all went down and met Mr. O'Hern in the lobby.

We went up to Mr. Robbins' room and Mr. Robbins said that Mr. O'Hern had told him that Mr. Hample and Mr. Hamilton had agreed to take $200 a share for their stock, and they said they had, and he said he guessed that was all there was to it. We called up Mr. Kizer and he came over and got the terms of the contract and went back to his office and drew it up.

After the contract was signed, I said, "Now, you fellows go on downtown. I will try and make my deal," and as they were going out they said jokingly, "These folks have a lot of money; make as good a deal as you can."

After they had gone out Mr. Robbins told me that they could not consider paying me $100,000 in addition to paying for the stock, since that would run the purchase price considerably over the option which I had given them, and that Mr. Armour would think they were mighty poor traders.

I told them that I was willing to live up to my agreement to sell my stock for $200 a share but *he* that they could not afford to buy my stock and then have me go into the meat business again. Finally Mr. O'Hern suggested that we figure the price of the stock at $220 a share and upon counting it up that

(Testimony of E. H. Stanton.)

came to a little over $92,000.00 and I told them that was not enough, so they offered to throw in the little Packard automobile, which I figured made a total of about $95,000, and I stated to them that $100,000 was my price. Then one of them suggested that they would give me four of five months to pick up the balance of the stock and would pay me $220 a share for it. I concluded that was about as good as I could do and about all I could get so I accepted that. This contract has been fully compiled with to date. [94]

At the time of the trade the book accounts amounted to about $350,000 and up to date I have paid Armour & Company $22,534.00 on bad accounts and in addition defended a lawsuit upon one of them. I actually stayed out at the plant about two months and rendered services in an advisory capacity up to about a week or ten days ago. Whenever they asked me any questions I answered it.

On the Saturday afternoon while Hamilton and Hample were in Spokane I told them I would like to have the note cancelled because they could sell their stock for just as much money with that note cancelled as not. I told them that I had worked pretty hard and I had been successful and had made them quite a lot of money, and they said it was absolutely all right with them.

I talked it up with Fred and he talked it over with Mr. Hamilton and Mr. Hample and drew up a resolution which was passed before Armour & Company knew anything about it.

(Testimony of E. H. Stanton.)

Upon cross-examination the witness further testified:

When I went over to Butte to talk the matter of selling over with Hamilton and Hample I didn't know whether we could get more than $150 from Armour & Company, but I was willing to sell for that price if I couldn't get more. [95] Hamilton, Hample and myself agreed that we would not take any less. We talked the matter over fully as to the resources of the company and our future prospects. We talked as fast as we could while I was there.

When they showed up Friday morning Fred brought them out to the plant and I spent most of the day showing them over the plant.

Q. Did you say anything then about the $150?

A. Well, we kind of—after they looked around, had their sights raised a little bit.

Q. Did you raise your sights? A. Yes.

Q. So you both agreed you would raise your sights right there, did you?

A. I was going to get all I could.

Q. You both agreed to raise your sights right there did you, if you could?

A. They said they thought they ought to have more money. I don't know whether I agreed to it or not, but they both said they did.

Q. What did you advise them about that?

A. I did not advise them.

Q. Was anything said about how much more they wanted? A. No, sir. [96]

Q. Did you say anything to them about what you

(Testimony of E. H. Stanton.)

thought Armour would stand on this sight raising?

A. No, sir, because I didn't know. We might have discussed it a little, but I don't recollect. I don't know as we did. We didn't do very much talking about the weather, or anything. We did more signing. I took them out to my house that night and they stayed there, put in the evening there. I didn't say anything to them very much about the stock. We might have talked it in a general way. They might have asked we what Armour's would give. I told them I didn't know. Nothing was agreed to. They got breakfast there the next morning. I went to the plant. They were at my house when I left. I saw them Saturday morning at the plant about 10 o'clock. They were there the biggest part of the day. Spent the day looking over the plant. I was not with them. They were there all day. Saw O'Hern and Robbins that day. I didn't talk trade to them that day. Hamilton and Hample didn't say anything about trade that day that I know of. There was no discussion between Hamilton and Hample and me on Saturday. Robbins wasn't there. O'Hern and Van Kleek were measuring up the frozen hogs and beef. They were pretty busy at it most of the day, and Hamilton and Hample stayed there all day, or at least most of the day. I don't know where they went. They didn't say anything to me about it. I next saw them Sunday morning at the plant about 10 o'clock. I was there a few hours in the morning. Stayed there probably until 2 o'clock. All we did there was to have a picture taken. They were at my house for

(Testimony of E. H. Stanton.)

dinner. I am not sure whether they went in the machine with me and Fred or whether they went from the hotel. We had dinner about 3 o'clock. While at my house, I don't know that anything was said about trade. I don't remember of any conversation on that subject. They left my house about 4 o'clock on Sunday. [97] Fred and a young lady whom he afterwards married took them in the car and took them out riding. I don't know where they went. I went over to town with them and got out. I saw them at my house Sunday night. I don't know what time they got back; I am not sure about that. We might have said something about the trade that night, but I do not remember it.

The witness then testified as follows as to the transactions of that night:

Q. Did they ask you how Armour & Company was acting, whether they were going to come across?

A. At that time it was our impression that they was.

Q. I am not asking you about your impression; I am asking you if those men asked you?

A. That was about three—that was over three years ago, Mr. Graves. It is pretty hard for me to remember.

Q. You remember a lot of things and I thought you might remember this.

A. Just the principal things.

Q. The discussion wasn't part of it?

A. We had so much discussion.

(Testimony of E. H. Stanton.)

Q. But you didn't have any discussion about the price, you have told me.

A. Oh, we was talking.

Q. I know you were talking, but I am asking you about discussion about price. Did you have any discussion about price?

A. We were talking probably about $200 a share for our stock.

Q. Probably? Don't you know whether you were or not?

A. They never made us an offer on that at that time.

Q. Wasn't Hamble and Hamilton and you discussing it?

A. Yes, we might have been; to satisfy you Mr. Graves, [98] I will say this: We might have been.

Q. Don't say it to satisfy me. Tell us the truth,—never mind me.

A. I don't know.

Q. Did they ask you whether Armour had made you a price? A. I don't know that they did.

Q. Did you ask them if Armour had made them a proposition? A. I don't think I did.

Q. And you didn't tell them whether Armour had made you a proposition? A. I did not.

Q. And they didn't tell you whether Armour had made them a proposition?

A. I don't think they did.

The witness then testified:

A. Hamble and Hamilton stayed all night at my

(Testimony of E. H. Stanton.)

house. I saw them at 10 o'clock the next morning at the plant.

Q. Anything said then about the price?

A. I would not say there was.

Q. Did they ever ask you whether Armour had made you any offer or not? A. No, sir.

Q. Did you tell them whether they had paid you or they tell you whether they had paid them?

A. I don't think so.

Q. Wasn't mentioned in any way? A. No.

Q. When was it you went to town?

A. About 1:30. [99]

Q. Got in the machine, did you, together and went to town? A. Yes, sir.

Q. And you told them Armour, you thought, was about ready to deal? A. Yes, sir.

Q. And you three men at their request were going down to the Davenport Hotel to meet Armour to close this deal involving over a million dollars?

A. We went there with the expectation that we were going to get the $200 a share for our stock.

Q. I say it involved over a million dollars and I suppose you discussed very anxiously, you three men, as you rode toward town what you would probably get, what Armour had to offer, and so on, did you?

A. I don't recollect that we did.

Q. Never mentioned it?

A. Might have mentioned it; yes.

Q. But did you?

A. I would not say that we did.

Q. Will you say you did not? A. No.

(Testimony of E. H. Stanton.)

Q. And as far as you recollect you just rode solemnly into town to clean up something over a million dollars and you never talked about it at all, and up to this time neither one of you knew what the other had been doing—is that it?

A. Practically, I think, yes.

Q. Practically? A. Yes, sir.

Q. All right, practically, then. [100]

STIPULATION.

It was thereupon stipulated by the parties in open court that the Rutter stock of 40 shares were purchased for Armour & Company by Mr. Van Kleek in August, 1917, for $200.00 and the Franklin stock was purchased in September, 1917, for $200 per share.

(There was thereupon admitted in evidence, without objection, the annual statement of the E. H. Stanton Company, for the year 1916, a copy of which was sent to Mr. Hamilton and Mr. Hample in January, 1917, said statement being marked Defendant's Exhibit No. 4.)

The material portion of said statement is as follows:

Defendant's Exhibit No. 4.

STATEMENT—E. H. STANTON COMPANY.

December 31st, 1916.

RESOURCES.

Real Estate, Blegs. & Equipment	$683 900 13	
Stocks	63 283 33	$747 183 46
Merchandise	465 658 62	
Accounts Receivable	240 769 02	
Notes Receivable	25 660 00	
Cash	8 647 15	740 734 79
		$1 487 918 25

LIABILITIES.

Notes Payable	377 000 00	
Accounts Payable	38 133 62	415 133 62
Capital Stock		600 000 00
Surplus		472 784 63
		$1 487 918 25

[101]

Testimony of Don Kizer, for Defendant.

DON KIZER was called and sworn as a witness on behalf of defendant and testified as follows:

Direct Examination.

I have been practicing law in Spokane 16 years and have done considerable business for the E. H. Stanton Company. I knew nothing of the proposed sale of stock of that company until the 21st day of May, 1917, when Fred Stanton called me about 2 o'clock in the afternoon to come over to a certain room in the Davenport Hotel. I went there and met Mr. Hamilton, Mr. Hample, Mr. Stanton, Mr. Robbins, and Mr.

(Testimony of Don Kizer.)

O'Hern. Mr. Robbins informed me that he had agreed to buy the stock of Mr. Hample and Mr. Hamilton for $200 per share, payable in five installments. Part of the purchase price was to be paid in notes and we figured the amount of the notes and the dates. Hamilton and Hample said that they had no objection to reducing the cash payments in order to make the notes come out in even figures; that money was no particular object to them and that 5% interest was better than they could get out of Liberty Bonds. While we were talking Mr. Scribner, the auditor for Armour & Company, came in and handed a slip of paper to Mr. Robbins. Mr. Robbins, upon reading it, inquired if it was true that they had given back a $25,000 note to Mr. Stanton which was one of the assets of the company, and someone, I think it was Mr. Stanton, said, "Yes," and Mr. Robbins remarked that that was hardly fair right on the eve of a trade. Mr. Hamilton or Mr. Hample, I am not certain which, said that Mr. Stanton had been out there ever since the organization of the company and had never been paid enough. That they had always told him he hadn't been paid enough and they thought he ought to have that note cancelled or something like that and that they had decided to do so. After some further remarks Mr. Robbins said, [102] "Well, that isn't going to stop the trade."

I went back to the office and drew the contracts and returned with them. Upon my reading them Mr. O'Hern called attention to the fact that it was provided "Time is of the essence of this contract" and

(Testimony of Don Kizer.)

that the time allowed in the contract was scarcely sufficient to enable them to have the draft in Butte, so that phrase was stricken out and Mr. Hamilton and Mr. Hample said it didn't make any difference to them.

After the contracts were signed Mr. Hamilton made some remark about there being no use of carrying this stock back to Butte; that they would just as soon let Mr. Robbins take it, and reached toward the inside pocket of his coat, and Mr. Robbins replied that they preferred not to do business that way.

After talking a few minutes Mr. Stanton said, "You fellows go on downstairs; I want to make my deal now." They both laughed and prepared to leave and one of them said, jokingly, "Get as much money out of Armour as you can; he can afford it."

Mr. Robbins then told Mr. Stanton that he thought his price of $100,000 for staying out of business, guaranteeing the book accounts and assisting Armour & Company in the management of the plant was out of the question. That they had come west with an option to buy the stock at $220 a share and that if they paid Mr. Stanton this amount it would make the aggregate more than the amount of the option and that he didn't have the nerve to report back to the Chicago office after doing such a thing.

Mr. Stanton said, "You have offered me $200 for my stock and I will take $200 just as I agreed, but now you are speaking of something else and that is a horse of a different color. If you want it you will have to pay for it." There was considerable argu-

(Testimony of Don Kizer.)

ment and conversation. Mr. Stanton insisted that he would either sell his stock for $200 a share or he would sell for $200 and for $100,000 additional would stay out of business and guarantee these bills. [103]

Mr. Robbins suggested that they would rather risk buying the other outstanding stock and keeping Mr. Stanton with them than doing that because he was acquainted with the trade and they didn't care to have him for a competitor.

Mr. Stanton finally suggested that if they calculated the difference between $200 and $220 per share upon all the stock it would amount to close to $100,000.00. We all figured up on that basis and it came to $92,266.66 and Mr. Robbins said, "Mr. Stanton, that is just as high as we dare go." But Mr. Stanton still said that that wasn't enough. Then one of them, either Mr. Robbins or Mr. O'Hern, suggested that they would throw in the Packard car which had been talked about and Mr. Stanton said that would only make $94,000 or $95,000. There was a great deal of argument after that and trading back and forth and finally Mr. Robbins offered to agree to buy from Mr. Stanton all of the stock which he could pick up and pay him $220 a share for it and Mr. Stanton finally consented to that. I then outlined to them a contract figured upon the basis of the stock at $200 per share and $92,000-odd dollars for these other things. Mr. Robbins said it would be best not to put it in that way; that Armour & Company were always accused of being a trust and always trying to drive their competitors out of business and they didn't like

(Testimony of Don Kizer.)

to show any money consideration for that agreement and asked if it couldn't all be lumped in at that sum.

Then the question was brought up as to Mr. Stanton's agreement to stay out of business, and after some talk about how that provision should read Mr. Robbins said he didn't know that it was necessary, that if Mr. Stanton would not give the company his best efforts he would be no good to them and that if he was willing to do so it was not necessary to put it on paper.

On the 4th of June, I received a telegram from Mr. Robbins saying there was some trouble over the Hamilton stock. I telegraphed in reply that I knew nothing about it. I then [104] received a telegram, which is Plaintiff's Exhibit 16, requesting me to go to Butte immediately and arrange to have Mr. Hamilton comply with his contract or to bring action to compel him to do so. I went to Butte and reached there on June 6 and went to Mr. Hamilton's office. I found Mr. Hamilton and Mr. Hample there together.

Mr. Hamilton informed me that Armour & Company had not deposited their money and notes with the Clark Brothers Bank on the 25th day of May, and that he had drawn out his stock because of their failure; he also said that before he left Spokane, Mr. Fred B. Grinnell had told him and Mr. Hample that Mr. Stanton was getting $20 a share upon their stock and was getting $220 upon his own and they had become convinced that Armour & Company and Stanton had tried to cheat him. Mr. Hample said that was

(Testimony of Don Kizer.)

so and that if he had any way of getting out of it he would not have deposited his stock. I told them that I was going to start suit if Mr. Hamilton did not deliver his stock. Mr. Hamilton requested me not to start suit, that he had consulted one lawyer but that he preferred to consult another one. I told him I didn't like to leave Butte without some agreement being reached and he agreed to hold his stock until the 16th of June. I thereupon wrote out an agreement which he signed and which is Exhibit 11.

On the morning of the 15th I received a letter from Mr. Hamilton which has been admitted in evidence heretofore, and I went over to Butte. I reached there on the night of the 16th with the intention of starting suit. I had learned meanwhile that he had purchased 773 1/3 shares of stock belonging to the Overholt Estate.

When I reached Butte I went over to see Mr. Hamilton and found Mr. Hamilton and Mr. Hample together. At every conversation I had with him I found the two together. He told me that he had consulted Mr. Sanders and that Mr. Sanders had informed him that he had a perfect defense upon the ground of fraud; that the contract [105] had not been lived up to.

After considerable argument that day I wired Armour & Company for authority to make a deal for both the Overholt stock and the Hamilton stock and received the authority the next day.

I then informed Mr. Hamilton that we would give him $220 a share for the Overholt stock if he would

(Testimony of Don Kizer.)

sell his stock for $222 as originally agreed, but he refused to sell any of the stock for less than $220. I called his attention to the fact that he had bought the Overholt stock for $190 and that he would make a profit of over $22,000 on that alone. He said he was entitled to all the profit he could get and that he was going to get $220 for the other.

We had negotiations lasting over several days. I tried to purchase one group of stock from Mr. Hamilton, but he refused to sell one without the other. He asked various prices and finally came down to $205 per share for hi*w* own stock and $220 for the Overholt stock.

On the 18th day of June, I entered into a contract with Mr. Hamilton providing he would not sell his stock for a time. On the 22d of June, Mr. O'Hern reached Butte, and we told him we were going to bring suit, and I drew a complaint for that purpose.

Then we entered into a stipulation with Mr. Hamilton to deposit the stock, notes and draft in the bank.

Mr. O'Hern and I arranged to leave town that day and I arranged for another attorney to have the complaint served. We were walking down Main Street in Butte when we met Mr. Hamilton and we informed him we were leaving town that night. Mr. Hamilton said not to be in a hurry that we might reach an agreement yet and Mr. O'Hern said the best that they could do was to give him $200 for his stock and $220 for the Overholt stock and pay eight (8) per cent interest on $43,000 from May 25, and Mr. Hamilton agreed to take that. [106]

(Testimony of Don Kizer.)

The whole thing was closed up at once. The two bunches of stock were turned over to Mr. O'Hern and he turned the two drafts and the notes over to Mr. Hamilton. This was on June 23, 1917. Mr. Stanton gave me a writing waiving any right to sell this Overholt stock under his contract.

The witness further testified as follows upon cross-examination by Mr. GRAVES:

I am not certain whether I had delivered to Mr. Martin the identical draft that had been sent to Butte for him, but I delivered him the identical notes that had been executed by Armour & Company for the stock on the deal of May 21 in Spokane; that the original draft would be for forty-three thousand odd dollars. On June 19th, I gave him a draft for $34,-133.33 on account of the Overholt stock. I delivered him four notes executed on June 21, 1917; that $34,-133.33 draft was drawn in Chicago and the notes were executed there. Mr. O'Hern brought that draft and those notes to Butte with him. He got there on the 21st. These notes bore date the 21st. The handwriting on the dates is different and seems to have been inserted. The ink is quite different. The date June 21 is different ink. It looks as though the date had been inserted. My only reason for saying that is from its appearance. That applies both to the date of the note and the date on which it becomes payable. They might have been dated by O'Hern after he got there. They might have been mailed to him from Chicago. I do not know why they bear the date of June 21st instead of the 23d. I haven't any idea

(Testimony of Don Kizer.)

why the draft was dated on the 19th. I don't know whether Mr. O'Hern brought the draft with him. I don't know whether O'Hern told me he had the notes and draft with him when he came. I have no recollection at all as to whether the notes were made in Chicago, signed in Chicago, dated in Chicago, or whether the dating was done by O'Hern after he got there. I have no recollection as to why the draft was [107] dated the 19th and why the notes were dated the 21st. Neither recollection nor knowledge on this subject. I have no knowledge, no information, and nothing was told me or said to me about why the notes would be made on the 21st so as to bear interest for two days before the deal was actually made.

THEREUPON it was stipulated in open court that the copies of the notes could not be put in evidence, but that the original notes might be shown to the jury, might be used to the jury in argument for the purpose of aiding them in determining as to the dates in the notes being filled in in a different handwriting.

Before the Court instructed the jury the defendant requested the Court to give the following instructions:

Instructions of Court to the Jury.

INSTRUCTION No. I.

The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and

that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock.

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock. [108]

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein.

INSTRUCTION No. II.

The defendant contends that he did not sell the plaintiff's stock, but that the plaintiff sold his own stock, and that the plaintiff fixed the price therefor, to wit, the sum of $200 per share. If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff and not by the defendant, the

plaintiff cannot recover in this action, and your verdict must be for the defendant.

INSTRUCTION No. III.

The defendant contends that he sold the stock of himself and the members of his family, to wit, 2420⅓ shares, at $200 per share, and that the amount in excess thereof, as set forth in the written contract, to wit, $92,266.66 and a certain automobile were paid to him in consideration of his agreement not to engage in the meat business or any other business then conducted by the corporation E. H. Stanton & Company in the States of Washington, Oregon, Idaho and Montana, for a period of ten years, and for his personal guarantee of the collection of the book accounts and accounts receivable of said corporation, and for his promise to assist Armour & Company in and about the business of said corporation for a period of six months or a year. While the written contract states a lump sum, to wit, $576,400 for the stock [109] and for the agreement of Stanton not to engage in the meat business and the other business mentioned in said four states for the period of ten years, and for his personal guarantee of the collection of said book accounts and accounts receivable, you have the right, if the evidence justifies it, to find that a part of that total consideration, to wit, $576,400, was for the purchase price of the stock itself and a part of that consideration was for Stanton's agreement to guarantee said accounts and for Stanton's agreement not to engage in said meat and other business as above stated. An agreement on the part of Stanton to guarantee said book accounts and not to engage in

said business in said states for the time named would be a valid and enforceable agreement. If you should find from the evidence that of the consideration named in said written contract, to wit, $576,400, $92,266.66 thereof was paid or agreed to be paid to the defendant Stanton for his agreement to guarantee said book accounts and not to engage in said business in said states for the period named, then you must find as a fact that Stanton sold his own stock and the stock of the members of his family for the same price at which the plaintiff's stock was sold, and that the plaintiff cannot recover in this action even though you should find under the evidence that the defendant did in fact sell the plaintiff's stock. If you should find from the evidence that the true consideration for the defendant Stanton agreeing to guarantee these book accounts and not to engage in the meat and other business in said four states for the period of ten years was the sum of $92,266.66, either with or without the automobile referred to in the testimony, it is not material how that amount of $92,266.66 was arrived at. The plaintiff in that event could not recover from the defendant even though that amount was arrived at by taking the total number of shares owned by Stanton and his family and the number of shares owned by the plaintiff Hample and the plaintiff Hamilton, and [110] multiplying the same by $20. Under the circumstances stated the method of arriving at the result of $92,266.66 on the part of the agents of Armour & Company and the defendant Stanton, or either of them, is wholly immaterial.

INSTRUCTION No. IV.

If you should find from the evidence that before Armour & Company paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defend-ant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the bank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you should find in favor of the plaintiff on the other issues as stated above.

INSTRUCTION No. V.

If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company, but that Armour & Company failed to deposit the moneys and notes in the same bank as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud, and thereafter plaintiff entered into another contract with Armour & Company, whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor, part in money

and part in promissory notes, then you must find for the defendant in [111] this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

INSTRUCTION No. VI.

There is in evidence a paper writing dated May 8, 1917, addressed to Fred. B. Grinnell, and signed by the defendant, and the same is Exhibit No. 2. This paper writing has been referred to as an option. No consideration therefor is recited therein, and there was apparently no money consideration given therefor. I instruct you that the defendant had a right to rescind the so-called option and to withdraw therefrom at any time, and the paper writing was not binding upon him except if Mr. Grinnell found a purchaser ready, willing and able to buy, he would be entitled to his commissions as stated therein, whether the sale was actually made or not.

INSTRUCTION No. VII.

Some evidence was introduced upon the cross-examination of the defendant Stanton in relation to the appraisement and purchase of the Armstrong stock. Before the evidence on that subject was completed and before the witness Stanton had testified fully in relation thereto, the Court ordered all of the evidence in relation to that matter stricken from the record. I therefore charge you that you shall disregard said evidence and shall not permit same, or any part thereof, to influence your minds in any manner in arriving at a verdict in this case. [112]

Thereupon the case was argued by the respective

attorneys and thereafter the Court instructed the jury as follows:

GENTLEMEN OF THE JURY: The case of Hamilton vs. Stanton and the case of Hample vs. the same defendant have been consolidated for the purpose of this trial, but you will, nevertheless, be required to return two separate verdicts. The two cases are identical with one exception to be hereafter noted so that the charge I am now about to give you in the Hample case will be applicable to the Hamilton case with the exception to which I will later direct your attention.

After alleging certain *jurisdiction* facts and the incorporation of E. H. Stanton & Company, the complaint alleges in substance that on the 8th day of May, 1917, the plaintiff was the owner of 1096⅓ shares of the capital stock of the E. H. Stanton Company; that prior to that date the plaintiff had at the special instance and request of the defendant assisted the defendant in financing the corporation and that their relations then and at all times prior to the last-mentioned date had become and were close and confidential; that the plaintiff had assisted the defendand to his benefit in a financial way in placing the corporation on a sound financial basis; that during all that period the defendant was the president and general manager of the corporation; that prior to the month of May, 1917, the defendant requested the plaintiff to hold his stock consisting of the above number of shares, and to refrain from placing the same upon the market or selling the same until such time as the defendant should [113] sell his stock in the

corporation; and in consideration of the withholding of his stock by the plaintiff from the market the defendant represented and promised the plaintiff that he would advise the plaintiff of any opportunity to sell their stock together, and that the defendant would, without other consideration than the benefit accruing to him therefor, act as the agent of the plaintiff in placing the plaintiff's stock with any purchaser to whom the defendant might desire to sell his stock, and would secure for the plaintiff the best price possible, and the same price at which he, the defendant, might be able to sell his stock; that in consideration of these representations and promises the plaintiff agreed to and did hold his stock and did depend upon the defendant to place his stock at the same price as the defendant should secure for his own stock in the event of a sale; that during the month of May, 1917, without the knowledge or consent of the plaintiff, the defendant contracted to sell his stock and also the plaintiff's stock to Armour & Co., a corporation; and that the price stipulated in the contract of sale was $220 per share; that after the making of this contract between the defendant and Armour & Co., defendant represented to the plaintiff that he had an opportunity to sell the plaintiff's stock, together with his own, to Armour & Co., but falsely and fraudulently represented to the plaintiff that the price the defendant was to receive therefor was $200 per share; that the defendant contracted to sell to Armour & Co. 5084⅓ shares of the capital stock of the corporation at a price of $220 per share and that that amount or number of shares included the

plaintiff's stock; that without revealing to plaintiff the fact of this contract with Armour & Co. or the fact that any such contract had been entered into and by falsely and fraudulently stating to the plaintiff that the price at which the defendant's stock was to be sold and at which the plaintiff's stock was to be [114] sold was the sum of $200 per share, the defendant induced the plaintiff to sell his stock to Armour & Co., as he supposed, for the sum of $200 per share, when in truth and in fact the sale was made by the defendant to the said Armour & Co. at $220 per share and that the defendant took and received as the proceeds of said sale of plaintiff's stock the sum of $20 per share in excess of the amount paid to plaintiff or accounted for to him by the defendant; that the plaintiff delivered his stock to Armour & Co., or to the defendant for Armour & Co., and received therefor payment at the rate of $200 per share and no more; that the plaintiff at all times relied upon the defendant and upon his contract with the defendant to place and sell his stock at the same price which the defendant received for his and that by reason of the false and fraudulent statements and representation of the defendant to the plaintiff the plaintiff was defrauded out of the sum of $20 per share, which said sum defendant received and retained unlawfully and fraudulently to the plaintiff's damage in the sum of $21,926.67; that plaintiff did not know the true facts concerning such transaction until after the contract between defendant and Armour & Co. had been executed and did not learn the true facts concerning the same until long there-

after, and upon the discovery of such facts and of the fraud so perpetrated upon him the plaintiff demanded of the defendant that defendant pay over to him the balance of the purchase price, to wit, the sum of $21,926.67, which said demand was by defendant refused.

The answer admits the jurisdictional facts and the ownership of the stock by the plaintiff, the selling of the stock to Armour & Co., but denies substantially each and every other allegation in the complaint.

I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony. [115] By "preponderance of the testimony" is simply meant the greater weight of the testimony or the testimony which is the more creditable and convincing to your minds.

If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co., that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the price which the defendant was to get for his stock, *accept* such as defendant gave him, that by reason of the misstatement of concealment of any material fact or facts by defendant the plaintiff was induced to accept $200 a share for his stock, whereupon $20 on the number of shares owned by him was added to the price paid to the defendant for his stock without the plaintiff's knowledge or consent, and that this $20 a share was added to the

price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 a share, *that* I charge you that the amount of money thus received, to wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum.

On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant, and fixed upon his own selling price, there can be no recovery in this action, even though the defendant may have received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event [116] the plaintiff is still entitled to the right to recover regardless of the question of agency.

The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized the defendant to sell his stock at the same price that defendant would sell his own stock and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell the stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the de-

fendant and that the defendant received from Armour & Co. upon the sale of the plaintiff's stock the sum of $220 per share.

In order for the plaintiff to recover on this theory he must therefore establish by a preponderance of the evidence the following propositions:

1. That the plaintiff authorized the defendant to sell his stock and the defendant agreed to sell the same at the same price as he received for his own.

2. That the defendant did in fact sell the plaintiff's stock or induce the plaintiff to sell the same.

3. That the price which Armour & Co. agreed to pay for the plaintiff's stock was $220 per share and not $200 per share.

4. That Armour & Co. have actually paid or agreed to pay for the plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant.

If the plaintiff has failed to establish by the preponderance of the evidence any of these propositions, the plaintiff cannot recover upon that theory. If, however, you find from the preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant [117] is still retained by him.

The defendant contends, on the other hand, that he did not sell the plaintiff's stock, but that the plaintiff sold his own stock and that the plaintiff fixed the price thereon at the sum of $200 per share.

If the jury find from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action, and your verdict must be for the defendant, unless, as already stated, you find from the preponderance of the testimony that a part of the consideration for the sale of the plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him.

The defendant further contends that he sold the stock owned by himself and other members of his family, amounting to 2420⅓ shares, at $200 per share and that the amount in excess thereof as set forth in the written contract, $92,266.66 and a certain automobile, were paid to the defendant in consideration of his agreement not to engage in the meat business or any other business then conducted by the corporation of E. H. Stanton & Company in the states of Washington, Oregon, Idaho and Montana for a period of ten years, and for his personal guarantee of the collection of the book accounts and the accounts receivable of the corporation and for his promise to assist Armour & Co. in and about the business of the corporation for a period of six months or a year.

While the written contract states a lump value of the consideration of $576,400 for the stock and for the agreement of Stanton not to engage in the meat business and the other business mentioned in the said four states for the period of ten years, and for his personal guarantee of the collection of the book accounts and the accounts receivable, you have the

right, if the evidence warrants it, to find that a part of that total consideration of $576,400 was for the purchase price of the stock itself and part of [118] that consideration was for the definite agreement to guarantee the accounts and for his agreement not to engage in the meat and other businesses as already stated.

An agreement on the part of Stanton to guarantee the book accounts and not to engage in business in the said states for the period stated is a valid and enforceable agreement. If you should find from the evidence that of the consideration named in the written contract, to wit, $576,400, $92,266.67 thereof was paid or agreed to be paid to the defendant Stanton for his agreement to guarantee the book accounts and not to engage in business in the states and for the period aforesaid, then you must find as a fact that Stanton sold his own stock and the stock of the members of his family for the same price at which the plaintiff's stock was sold, and that the plaintiff cannot recover in this action, even though you should further find under the evidence that the defendant did in fact sell the plaintiff's stock.

If you should find from the evidence that the consideration for the defendant Stanton agreeing to guarantee the book accounts and not to engage in the meat and other business in such four states for a period of ten years was the sum of $92,266.66 either with or without the automobile referred to in the testimony, it is not material how that amount of $92,-266.66 was arrived at. The plaintiff in that event could not recover from the defendant, even though

that amount was arrived at by taking the total number of shares owned by the defendant and his family and the number of shares owned by the plaintiff Hample and the plaintiff Hamilton and multiplying the same by $20. Under the circumstances stated, the method of arriving at the result of $92,266.66 on the part of the agents of Armour & Company and the defendant Stanton, or either of them, is wholly immaterial except in so far as it may throw light upon the actual agreement between the parties. [119]

Of course, gentlemen of the jury, you will be controlled by the actual facts and actual agreement entered into by the parties and not by the mere form which these agreements may assume on paper. If you find in truth and in fact that the agreement between the parties was as above stated, there can be no recovery in this action; but if, on the other hand, you find that the foregoing agreement was a mere subterfuge to cover up or conceal the fact that a part of the consideration for the sale of the plaintiff's stock was in fact paid to the defendant Stanton, you will disregard the mere form and be governed by the facts as they actually exist. There is in evidence a certain optional agreement dated May 8, 1917, signed by the defendant. There was no consideration received on that agreement and there was apparently no money consideration given therefor. I instruct you, therefore, that the defendant had a right to rescind the so-called option and to withdraw therefrom at any time, and the paper writing was not binding upon him until the other party therein named found a purchaser ready, willing and able to buy. You

will consider this optional agreement, therefore, only in so far as it will enable you to determine what the consideration for the sale of the stock actually was.

I have already stated to you that there is one point of difference between the two cases. There is testimony tending to show that after his return to the State of Montana the plaintiff Hamilton withdrew his stock from the bank and attempted to rescind the contract for its sale entered into in the city of Spokane, as already stated. Upon that issue I charge you as follows:

If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co. [120] that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud, and thereafter the plaintiff entered into a new and independent contract with Armour & Company for a new consideration whereby he sold the stock in question, together with other stock in the same company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff.

If, however, you find from the preponderance of the testimony that the stock was finally delivered to Armour & Co., pursuant to the contract made and entered into in the city of Spokane and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery.

You, gentlemen of the jury, are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is disclosed; their knowledge of the facts about which they have testified; their opportunities for hearing, seeing or knowing the facts; the probability of the truth of their testimony, and all the facts and circumstances given in evidence and surrounding the witnesses at the trial.

I further charge you that if you find from the testimony that any witness has willfully testified falsely to a material fact, you are at liberty to disregard the testimony of that witness entirely except in so far as he may be corroborated by other credible testimony or by other known facts in the case. [121]

Some evidence was introduced on the cross-examination of the defendant Stanton in relation to the appraisement and sale of stock belonging to a party named Armstrong. Before the evidence on that subject was completed and before the witness had testified fully in relation thereto, the Court ordered all the evidence in relation to that matter stricken from the

record. I therefore charge you that you must disregard such evidence and you will not permit the same to influence your minds in any manner in arriving at your verdict. I further charge you that testimony was offered here tending to show that the defendant Stanton was convicted of the crime of larceny in the territory of Montana some thirty-odd years ago. You may consider this testimony in so far as it affects the credibility of the witness; but you must not consider it for any other purpose or allow it to influence you in any manner.

EXCEPTIONS.

The following exceptions to the charge of the Court to the jury were taken by the defendant in open court before the jury retired to consider of their verdict, to wit:

I.

Defendant excepts to the ruling of the Court that the burden is upon the plaintiff to prove the material facts alleged in the complaint only by fair preponderance of the evidence instead of by evidence clear and convincing, as shown by the following portion of the charge, to wit:

> "I will state at the outset that the burden is upon the plaintiff to make out his case and to prove every essential fact material to a recovery by a fair preponderance of the testimony." [122]

II.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action although the defendant did not in fact sell the stock of the

plaintiff, as shown by the following portion of the charge, to wit:

> "If you find in this case from a preponderance of the testimony that the defendant assumed and agreed to and did actually conduct the negotiations which resulted in the sale of the stock from the plaintiff to Armour & Co.; that the plaintiff had no information concerning the price which Armour & Co. was willing to pay or the price which defendant was to get for his stock except such as the defendant gave him; that by reason of the misstatement or concealment of any material fact or facts by the defendant, plaintiff was induced to accept $200 a share for his stock whereupon $20 on the number of shares owned by him was added to the price paid to defendant for his stock without plaintiff's knowledge or consent, and that this $20 per share was added to the price paid defendant because Armour & Co. had been able to procure plaintiff's stock for $200 per share, then I charge you that the amount of money thus received, to wit, $20 a share, on the number of shares owned by plaintiff rightfully belongs to the plaintiff and that the defendant in equity and good conscience cannot retain it, and that your verdict should be for the plaintiff in that amount, together with interest thereon from the time of its receipt by the defendant at the rate of 5% per annum."

III.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action if he

was induced to sell his stock for $200 per share by reason of the misstatement or concealment of any material fact or facts by the defendant, as shown in that portion of the charge last quoted.

IV.

Defendant excepts to the ruling of the Court that the plaintiff might recover in this action from the defendant if the plaintiff was induced to sell his stock at $200 per share by reason of the misstatement or concealment of any material fact or facts by defendant and such misstatement or concealment is shown by a preponderance of the testimony rather than by evidence clear and convincing, as shown by that portion of the charge last quoted. [123]

V.

Defendant excepts to the ruling of the Court that, although the defendant did not sell plaintiff's stock, but the plaintiff sold his own stock, if the defendant was paid a higher price on account of the sale of his own stock because the plaintiff sold his stock for only $200 per share, that the plaintiff may recover in this action, as shown by that portion of the charge last quoted.

VI.

Defendant excepts to the ruling of the Court that knowledge or lack of knowledge of the plaintiff as to the price which defendant was to get for his own stock was a material fact to be taken into consideration by them, as shown in that portion of the charge last quoted.

VII.

Defendant excepts to the ruling of the Court that,

as shown in the charge above quoted, the plaintiff might recover the full amount sued for, to wit, $21,926.66, and that the defendant "in equity and good conscience" cannot retain any part thereof, although the defendant had paid or agreed to pay a 2% commission to a broker for bringing about such sale and the defendant had been required by Armour & Co. in order to bring about sale to guarantee the book accounts of the E. H. Stanton Company and had actually paid on that account the sum of $22,534.00.

VIII.

Defendant excepts to the ruling of the Court that, although the plaintiff sold his own stock on his own responsibility he may recover in this action if he advised or consulted with the defendant in relation thereto, as shown by the following portion of the charge, to wit:

> "On the other hand, I charge you that if the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without advising or consulting with the defendant and fixed his own selling price, there can be no recovery in this action, even though the defendant may have [124] received a greater price for his own stock, unless you find from a preponderance of the testimony that a part of the consideration for the sale of the stock owned by the plaintiff was actually paid to and received by the defendant and is still retained by him. In the latter event, the plaintiff is still entitled to the right to recover regardless of the question of agency."

IX.

Defendant excepts to the ruling of the Court that, if there was paid to the defendant any moneys whatsoever on account of the sale of the plaintiff's stock, the plaintiff may recover, although the defendant was neither agent nor trustee for the plaintiff, and the plaintiff conducted the negotiations for the sale of his stock on his own responsibility and fixed his own selling price therefor, as shown by that portion of the charge last quoted.

X.

Defendant excepts to the ruling of the Court to the effect that, although the defendant was neither agent nor trustee for the plaintiff and did not sell plaintiff's stock, but plaintiff sold his own stock on his own responsibility, if defendant received any moneys on account of such sale that he must account for the whole thereof to plaintiff, although he may have paid or contracted to pay 2% of the selling price of said stock to a broker and may have paid $22,534 on account of his contract with Armour & Co. to guarantee the book accounts of the corporation, which contract Armour & Co. made a condition precedent to the purchase of any stock in said corporation.

XI.

Defendant excepts to the ruling of the Court that, although the plaintiff conducted the negotiations for the sale of his stock on his own responsibility without consulting the defendant and fixed his own selling price therefor and received the $200 per share so fixed by the plaintiff, that nevertheless the plaintiff may recover in this action if Armour & Co. allowed

the defendant $20 for each of the shares owned by the plaintiff on account [125] of the agreement of the defendant not to engage in any manner in the four northwestern states for the period of ten years in the meat business or any other business conducted by E. H. Stanton Company or on account of commissions to Fred B. Grinnell on any other account, as shown by that portion of the charge last quoted.

XII.

Defendant excepts to the charge of the Court as set forth in the two quotations made above as inconsistent with the ruling and charge of the Court as stated in the following portion of the charge, to wit:

> "The theory of the plaintiff's case as stated in the complaint is this: That the plaintiff authorized defendant to sell his stock at the same price that defendant would sell his own stock, and that the defendant falsely and fraudulently represented to the plaintiff that the selling price was $200 per share and that in reliance thereon plaintiff agreed to sell his stock to Armour & Co. for the sum of $200 per share, whereas the sale was in fact made by the defendant, and that the defendant received from Armour & Co. upon the sale of plaintiff's stock the sum of $20 per share.

XIII.

Defendant excepts to the ruling of the Court that the plaintiff might recover upon some other theory than that stated in the complaint as quoted above, as shown by the following portion of the charge which follows that quoted above, to wit:

"In order for the plaintiff to recover *on this theory,* he must therefore establish by a preponderance of the evidence the following propositions: (1) That the plaintiff authorized defendant to sell his stock and the *plaintiff authorized defendant to sell his stock and the* defendant agreed to sell the same at the same price that he received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant."

This charge is also inconsistent with those portions of the charge quoted in Exceptions Nos. 2 and 8. [126]

XIV.

Defendant excepts to the ruling of the Court that plaintiff may recover in this action, although the defendant did not sell the plaintiff's stock, provided the defendant induced the plaintiff to sell his stock for $200 per share, as shown in the charge last quoted.

XV.

Defendant excepts to the ruling of the Court that, although the plaintiff has not established by a preponderance of the evidence the theory of his case, as outlined in the complaint, he may nevertheless recover in this action upon another and inconsistent theory, as shown by the following portion of the charge which

was given immediately following that portion last above quoted, to wit:

> "If the plaintiff has failed to establish by a preponderance of the evidence any of these propositions, the plaintiff cannot recover on that theory. If, however, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was in fact paid or agreed to be paid to the defendant by Armour & Co., the plaintiff has a right of action for the sum thus paid or agreed to be paid to the defendant if still retained by him."

XVI.

Defendant excepts to the ruling of the Court that, although none of the following propositions are established by the evidence, to wit: "(1) that the plaintiff authorized defendant to sell his stock and that the defendant agreed to sell the same at the same price he had received for his own; (2) that the defendant did in fact sell plaintiff's stock or induce plaintiff to sell the same; (3) that the price which Armour & Co. agreed to pay for plaintiff's stock was $220 per share and not $200 per share; (4) that Armour & Co. have actually paid or agreed to pay for plaintiff's stock the sum of $220 per share, paying or agreeing to pay $20 thereof to the defendant,"—that nevertheless plaintiff may recover in this action if any moneys were paid or [127] agreed to be paid to the defendant on account of plaintiff's stock, as shown in that part of the charge last quoted.

XVII.

Defendant excepts to the failure of the Court to de-

fine what is meant by the expression "if still retained by him" in that part of the charge last quoted.

XVIII.

Defendant excepts to the ruling of the Court that if Armour & Co. paid to the plaintiff by way of commission or bonus or any other account any moneys on account of the sale of the plaintiff's stock, although the plaintiff sold his own stock upon his own responsibility, that the plaintiff may recover in this action, as shown by the following portion of the charge, to wit:

> "If the jury finds from the evidence that the stock of the plaintiff was sold by the plaintiff on his own responsibility and not by the defendant, the plaintiff cannot recover in this action and your verdict must be for the defendant unless, as already stated, you find from a preponderance of the testimony that a part of the consideration for the sale of plaintiff's stock was actually paid to or agreed to be paid to the defendant and was actually received and is still retained by him."

XIX.

Defendant excepts to the ruling of the Court that moneys paid or agreed to be paid by the defendant to the broker Grinnell under the optional agreement in evidence and moneys paid on account of the guaranty of the book accounts made by the defendant and required by Armour & Co. to be made by him, are not to be considered as moneys not retained by the defendant, as shown by that portion of the charge last quoted and by the other quoted portions of the charge, and that plaintiff may recover as though such pay-

ments had not been made or that defendant was not liable therefor.

XX.

Defendant excepts to the ruling of the Court that the plaintiff may recover upon either of two inconsistent theories, [128] one being that outlined in the complaint, to wit: that defendant sold the stock of the plaintiff and received a part of the consideration therefor; that the selling price was $220 per share; and that the plaintiff got $200 per share thereof while the defendant got $20 per share thereof. The other theory not outlined in the complaint is that the plaintiff sold his own stock, fixed the price therefor himself upon his own responsibility, such price being $200 per share, but that if Armour & Co. allowed the defendant on any account the sum of $20 per share for the number of shares owned by the plaintiff, that the plaintiff may recover in this action, all of which is shown by the quotations already made from the charge.

XXI.

Defendant excepts to the ruling of the Court that, although the plaintiff repudiated the contract made by him dated May 21, 1917, upon the ground that he had entered into it through fraud and misrepresentation and withdrew from the bank his stock theretofore deposited by him and thereafter made a new and independent contract with Armour & Co. whereby he sold the stock in question, together with other stock in the same company acquired by him after May 21, 1917, and Armour & Company paid him therefor, that is, for both quantities of stock, that nevertheless

plaintiff may recover in this action unless the second contract had "a new consideration" therefor, as shown by the following portion of the charge, to wit:

> "If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him and Armour & Co., but that Armour & Co. failed to deposit the money and notes in the bank as provided in the contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from the bank and notified Armour & Co. that he repudiated his contract and would not live up to the same, claiming that he had been induced to enter into the contract through misrepresentation and fraud and thereafter plaintiff entered into a new and independent contract with Armour & Co. for a new consideration whereby he sold the stock in question, together with other stock in the same Company, and that Armour & Co. paid him therefor part in money and part in promissory notes, then you must find [129] for the defendant in this action, even though as to the other issues stated above you should find that the evidence is in favor of the plaintiff. If, however, you find from a preponderance of the testimony that the stock was finally delivered to Armour & Co. pursuant to the contract made and entered into in the City of Spokane, and not pursuant to some new and independent contract, the attempt on the part of the plaintiff Hamilton to rescind his contract will not bar a recovery."

XXII.

Defendant excepts to the ruling of the Court that, although the plaintiff withdrew his stock from the bank, as stated above, and notified Armour & Co. that he repudiated the same because he had been induced to enter into the same through fraud and misrepresentation and, although the plaintiff had after May 21, 1917, purchased from another stockholder 773⅓ shares at $190 per share and did in the latter part of June, 1917, make a deal with Armour & Co. whereby he sold said 773⅓ shares at $220 per share and his original 1096⅓ shares at $200 per share, getting for the latter stock the same price which he would have gotten had he lived up to his contract of May 21, 1917, that the plaintiff may still recover in this action, as shown in that portion of the charge last quoted.

XXIII.

Defendant excepts to the modification made in the charge as requested by the defendant in Instruction No. 1, said modification being shown in that part of the charge quoted in exception Nos. 12 and 13. Said instruction No. 1 is as follows, to wit:

> "The theory of plaintiff's case as set out in the complaint is that the plaintiff authorized the defendant, E. H. Stanton, to sell his stock, and that E. H. Stanton agreed with the plaintiff to sell plaintiff's stock at the same price he sold his own stock and that the defendant falsely and fraudulently represented to plaintiff that the selling price was $200 per share, and that in reliance thereon the plaintiff agreed to sell his stock to Armour & Company for $200 per share, but that

the sale was in fact made by the defendant, and that the defendant received from Armour & Company upon the sale of plaintiff's stock the sum of $20 per share for said stock. [130]

In order for the plaintiff to recover he must establish by a preponderance of the evidence the following things:—

(a) That the plaintiff authorized the defendant to sell plaintiff's stock and the defendant agreed to sell plaintiff's stock at the same price he sold his own stock.

(b) That defendant did in fact sell plaintiff's stock.

(c) That the price which Armour & Company promised to pay for plaintiff's stock was $220 per share, and not $200 per share.

(d) That Armour & Company have actually paid for plaintiff's stock the sum of $220 per share, paying $20 thereof to the defendant.

If the plaintiff has failed to establish by a preponderance of the evidence any of said matters, the plaintiff cannot recover herein."

XXIV.

Defendant excepts to the ruling of the Court that, although the plaintiff knew, before Armour & Co. had paid the plaintiff any money or delivered any notes, of the terms of the contract made between the defendant and Armour & Co. and thereafter the plaintiff did not attempt in any manner to recede from his contract which he had made with Armour & Co., but went on and performed the same in accordance with the terms, and that such acts on the part of plaintiff

are not material and do not affect his right to recover herein, and that he may recover notwithstanding the same, as shown by the refusal of the Court to give Instruction No. 4 requested by the defendant, which is as follows, to wit:

> "If you should find from the evidence that before Armour & Company actually paid any money or delivered any notes to the plaintiff, the plaintiff learned in substance of the contract made between the defendant and Armour & Company, and did not attempt in any manner to recede from the contract which the plaintiff had signed with Armour & Company, which contract is in evidence, but went on and performed the same by depositing his stock in the vank, as provided in said contract and accepted the moneys and notes as paid by Armour & Company, then the plaintiff cannot recover in this action even though you should find in favor of the plaintiff on the other issues as stated above."

XXV.

Defendant excepts to the ruling of the Court against giving instruction No. 5 requested by the defendant and to the [131] modifications in such instruction as given by the Court, which modifications are shown in exception No. 21. Said instruction No. 5 is as follows, to wit:

> "If you find from the evidence that the plaintiff deposited his stock according to the terms of the written contract signed by him with Armour & Company, but that Armour & Company failed to deposit the moneys and notes in the same bank

as provided in said contract on or before the day named therein, and that thereafter the plaintiff withdrew his stock so deposited from said bank, notified Armour & Company that he repudiated said contract and would not live up to the same, claiming that he had been induced to enter into said contract through misrepresentation or fraud and thereafter plaintiff entered into another contract with Armour & Company whereby he sold the stock in question together with other stock in the same company, and that said Armour & Company paid him therefor, part in money and part in its promissory notes, then you must find for the defendant in this action, even though as to other issues stated above you should find that the evidence is in favor of the plaintiff."

Thereupon the jury retired to consider the evidence and returned a verdict for the plaintiff and against the defendant in the sum of $25,109.06. [132]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Settling Bill of Exceptions.

I, FRANK H. RUDKIN, Judge of the above court

and the Judge who presided in said court on the trial of the foregoing cause, do hereby certify that the matters and proceedings set out in the foregoing bill of exceptions are matters and proceedings occurring in this cause and not already a part of the record therein, and that the bill of exceptions was filed within the time allowed by law as extended by order of the Court, and said bill of exceptions is made a part of the record herein. I further certify that after amendments were proposed by plaintiff to said bill of exceptions, a hearing was had thereon and all the amendments proposed by plaintiff have been incorporated in said bill of exceptions except where by agreement of the parties the same were modified.

I further certify that said bill of exceptions conforms to the truth and contains all the matters and facts material in the proceedings heretofore occurring in the cause and not already a part of the record therein and necessary for the review of this cause by the Circuit Court of Appeals, and the said foregoing bill of exceptions with the amendments proposed by plaintiff incorporated therein, so far as allowed, is hereby settled, allowed and certified as the true bill of exceptions in this cause.

Done in open court this 31st day of July, 1920.

FRANK H. RUDKIN,
District Judge. [133]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

E. H. STANTON,

Plaintiff in Error,

vs.

J. L. HAMILTON,

Defendant in Error.

Praecipe for Transcript of Record.

To W. H. Hare, Clerk of United States District Court:

You will please prepare and certify the record to be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the said record to include the following:

Complaint, amended answer, verdict of the jury, judgment, order extending time for serving bill of exceptions, petition for writ of error, assignments of error, order allowing writ of error, writ of error, bond on writ of error, citation and return, bill of exceptions, order settling bill of exceptions.

DANSON, WILLIAMS & DANSON,
Attorneys for Plaintiff in Error.

Filed in the U. S. District Court, Eastern District of Washington. June 21, 1920. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [134]

In the District Court of the United States, for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Order Extending Time to and Including August 21, 1920, to Prepare Record.

Now, on this day, it is ORDERED by the Court, that the clerk of this court may have until August 21, 1920, to prepare and forward the record upon appeal, in the above-entitled cause.

Done this 7th day of July, A. D. 1920.

FRANK H. RUDKIN,
Judge. [135]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Eastern District of Washington,—ss.

I, W. H. Hare, Clerk of the District Court of the United States in and for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said

action, as the same remains of record and on file in the office of the clerk of the said court, as called for by the defendant and plaintiff in error in his praecipe; and that the same constitute the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, which writ of error was filed in my office on June 19, 1920.

I further certify that I herewith transmit the original writ of error and the original citation issued in this cause.

I further certify that the fees of the clerk of this court for preparing and certifying to the foregoing typewritten record amounts to the sum of Fifty-five and 85/100 (55.85) Dollars, and that the same has been paid in full by Danson, Williams & Danson, attorneys for defendant and plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 10th day of August, A. D. 1920.

[Seal] W. H. HARE,
Clerk. [136]

[Endorsed]: No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. E. H. Stanton, Plaintiff in Error, vs. J. L. Hamilton, Defendant in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed August 13, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Writ of Error (Original).

The President of the United States to the Honorable Judge of the District Court of the United States, for the Eastern District of Washington, Northern Division, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment on a plea which, in the said District Court before you or some of you, between E. H. Stanton, plaintiff in error (defendant in the lower court) and J. L. Hamilton, defendant in error (plaintiff in the lower court), a manifest error hath happened to the great damage of said E. H. Stanton, plaintiff in error, as by his complaint appears,—

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings, aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 19th day of June, in the year of our Lord one thousand nine hundred twenty.

[Seal] W. H. HARE,
Clerk of the United States District Court for the Eastern District of Washington, Northern Division.

Allowed by:

FRANK H. RUDKIN,
District Judge.

[Endorsed]: No. 3261. In the District Court of the United States for Eastern District of Washington. J. L. Hamilton, Plaintiff, vs. E. H, Stanton, Defendant. Writ of Error. Filed in the U. S. District

Court, Eastern Dist. of Washington. Jun. 19, 1920. Wm. *M.* Hare, Clerk. H. J. Dunham, Deputy.

No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 13, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Eastern District of Washington,—ss.

I hereby certify and return that I served the annexed Citation, on the therein named A. B. Lee, by handing to and leaving a true and correct copy thereof with him personally at Spokane, in said District, on the 21st day of June, A. D. 1920.

J. E. McGOVERN,
U. S. Marshal.
By J. W. Dennison,
Deputy.

Serving writ: $2.00.
Mileage ..... .06

$2.06.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

E. H. STANTON,
Plaintiff in Error,

vs.

J. L. HAMILTON,
Defendant in Error.

Citation on Writ of Error (Original).

The President of the United States to J. L. Hamilton, and to Messrs. Lee & Kimball and Graves, Kizer & Graves, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ pursuant to a writ of error regularly issued and which is on file in the office of the clerk of the District Court of the United States for the Eastern District of Washington, Northern Division, in an action pending in said court, wherein E. H. Stanton is plaintiff in error (defendant in the lower court) and J. L. Hamilton is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 21 day of June, 1920.

FRANK H. RUDKIN,
United States District Judge.

[Seal] Attest: W. H. HARE,
Clerk of Said Court.

[Endorsed]: No. 3261. In the District Court of the United States for Eastern District of Washington. J. L. Hamilton, Plaintiff, vs. E. H. Stanton, Defendant. Citation and Return. Filed in the U. S. District Court, Eastern Dist. of Washington. Jun. 21, 1920. Wm. H. Hare, Clerk. H. J. Dunham, Deputy.

No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 13, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

In the District Court of the United States for the Eastern District of Washington, Northern Division.

J. L. HAMILTON,

Plaintiff,

vs.

E. H. STANTON,

Defendant.

Notice of Substitution of Attorneys.

To the Above-named Plaintiff, and to Messrs, Lee & Kimball and Graves, Kizer & Graves, Your Attorneys:

The undersigned, attorneys of record for the defendant, hereby substitute as attorneys for defendant R. J. Danson, Jas. A. Williams and Robert W. Danson, partners as Danson, Williams & Danson, of Spokane, Washington, and you are notified that the undersigned are no longer connected with said case.

Dated this 14th day of May, 1920.

DON F. KIZER,
POST, RUSSELL & HIGGINS.

To the Plaintiff and Your Attorneys Above Named:

You are notified that R. J. Danson, Jas. A. Williams and Robert W. Danson, partners as Danson, Williams & Danson, have been substituted as my at-

torneys in the above action and you will recognize them as such.

Dated this 14th day of May, 1920.

E. H. STANTON.

[Endorsed]: No. 3538. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 19, 1920. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.